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No. (1)

IN THE

Supreme Court of the United States

JAMAR L. CAMPBELL,

Petitioner,

vs.

ELIZABETH BURRIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "adequate and independent state procedural grounds" doctrine applicable to *habeas* cases, if a state court refuses to review a federal claim because a defendant violated a procedural rule that is "independent" of federal law and "adequate" to support the judgment, a federal *habeas* court may not thereafter review that federal claim.

In this case, the Third Circuit held that a state court's application of its own procedural rule is "independent" of federal law when the state court reviews the merits of an otherwise waived federal claim for "plain error." In reaching that holding, the Third Circuit joined five other federal courts of appeals that agree on that point of law. Five other federal courts of appeals hold, to the contrary, that the state court's application of its procedural rule is, instead, "dependent" on federal law.

The question presented in this case is as follows:

Whether a state court's application of a state procedural rule is "dependent" upon federal law when the state court reviews the merits of an otherwise waived federal claim for "plain error."

LIST OF PARTIES

Petitioner Jamar L. Campbell is an inmate incarcerated in Delaware pursuant to a sentence of a Delaware state court. Respondent is Elizabeth Burris, acting warden of the facility in which Mr. Campbell is incarcerated. (Ms. Burris succeeded Thomas Carroll as warden. Mr. Carroll's name appears in the captions of the district court's opinion.)

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INTRODUCTION

Petitioner Jamar L. Campbell respectfully requests that a writ of *certiorari* issue to resolve a split among the federal courts of appeals.

Many states have procedural "waiver" rules that, for example, generally prohibit state courts of last resort from reviewing claims that were not raised below. Just the same, these rules may include exceptions, and state courts (as here) often have broad – sometimes unfettered – discretion to apply those exceptions. Particularly in criminal cases, states often exercise their discretion to review a claim that is otherwise waived for "plain" or "fundamental" error.[1] Review under this standard may, and often does, require an analysis of a federal question.

In the view of the Third Circuit, which in this case joined the First, Fourth, Sixth, Seventh and Eleventh Circuits, state courts may review an otherwise waived federal issue on the merits for "plain error" and still claim – successfully – that the decision rests on "independent" state procedural grounds. The five other circuits that have reached this issue – including the Second, Fifth, Eight, Ninth and Tenth Circuits – conclude that reviewing a federal claim on the merits under the "plain-error" component of a state procedural rule is "dependent" upon the resolution of a federal question.

The Third Circuit in this case acknowledged the conflict among the circuits and stated that this Court has yet to resolve whether a "plain-

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[1] Mr. Campbell will use "plain error" as a shorthand throughout this petition to describe state procedural rules that permit a review of the merits of an issue otherwise waived, even though some states may use other terms (*e.g.*, "miscarriage-of-justice" review or "fundamental-error" review).

error" review under a state procedural rule is "independent" of federal law. This Court should grant the petition, resolve the split, and review the Third Circuit's holding that Delaware Supreme Court Rule 8 is "independent" of federal law and "adequate" to support a state-court judgment.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at *Campbell v. Burris*, 515 F.3d 172 (3d Cir. 2007). The opinion of the district court (Appendix B) is unreported but available at *Campbell v. Carroll*, Docket No. 03-916-GMS, 2005 U.S. Dist. LEXIS 26557 (D. Del., Nov. 4, 2005). The opinions of the Delaware Supreme Court on direct appeal (Appendix C) and on appeal from the denial of post-conviction relief (Appendix D) are not released for publication in the permanent law reports but are available at *Campbell v. State*, 801 A.2d 10 (Del. 2002) and *Campbell v. State* 830 A.2d 409 (Del. 2003), respectively.

JURISDICTION

The court of appeals entered its judgment on February 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2254.

STATUTORY PROVISIONS INVOLVED

Section 2254 of the Anti-terrorism and Effective Death Penalty Act (the "AEDPA"), 28 U.S.C. § 2254, and Delaware Supreme Court Rule 8, are excerpted in relevant part in Appendices E and F, respectively.

STATEMENT OF THE CASE

In December 1999, Mr. Campbell was arrested and charged with possession with

intent to deliver cocaine and possession of cocaine within 300 feet of a park. A jury convicted Mr. Campbell of both charges. In August 2001, the Delaware Superior Court sentenced Mr. Campbell to 18 years incarceration. Mr. Campbell has been incarcerated at the Delaware Correctional Facility since his conviction and sentence.

Mr. Campbell appealed his conviction and sentence to the Delaware Supreme Court. On direct appeal, Mr. Campbell, acting *pro se*, raised nine claims – among them, claims of ineffective assistance of counsel.[2]

The Delaware Supreme Court affirmed the conviction and sentence. The court did not consider the ineffective-assistance claims on direct appeal. The court reviewed Mr. Campbell's non-ineffective-assistance claims for "plain error" under Delaware Supreme Court Rule 8, even though he did not raise them at trial. Rule 8 provides:

> Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

DEL. SUP. CT. R. 8. Although the phrase "plain error" does not appear in the rule, the "interest of justice" exception in Rule 8 has been interpreted by Delaware courts to mean a review for "plain error." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). "Plain error," in turn, is error that is "so clearly prejudicial to substantial

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[2] Mr. Campbell's counsel withdrew his representation, and Mr. Campbell was permitted to file a *pro se* brief raising issues before the Delaware Supreme Court on direct appeal.

rights as to jeopardize the fairness and integrity of the trial process." The "substantial rights of the claimant" has been interpreted by Delaware courts to mean his "constitutional" rights. *See Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) ("[W]e have reserved the plain error standard to claims affecting substantial rights, i.e. of constitutional dimension, because only such claims can be said to jeopardize the fairness and integrity of the trial process.") (internal quotation omitted)).

Applying Rule 8 and these standards, the court "reviewed the record carefully" and concluded that Mr. Campbell's non-ineffective-assistance claims lacked merit.

Mr. Campbell moved for post-conviction relief, which the trial court denied. On appeal from the denial of post-conviction relief, the Delaware Supreme Court declined to review Mr. Campbell's non-ineffective-assistance claims because it had previously conducted a "plain-error" review of their merits under Rule 8. The court reviewed Mr. Campbell's ineffective-assistance claims on the merits and summarily concluded that Mr. Campbell failed to present "evidence" of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Campbell thereafter filed a petition for a writ of *habeas corpus* in the district court. The district court denied Mr. Campbell's petition and declined to issue a certificate of appealability.

As to his non-ineffective-assistance claims, the district court concluded that Mr. Campbell could not raise them in federal court because the state court reviewed the merits of those claims under Rule 8's "plain-error" component. The *habeas* court found that Rule 8 was an "independent and adequate state ground" that precluded federal *habeas* review. As to his

ineffective-assistance claims, the district court concluded that Mr. Campbell exhausted some, failed to exhaust others, and in either event failed to satisfy his burden under Section 2254 of the AEDPA, 28 U.S.C. § 2254.

Mr. Campbell appealed the denial of his *habeas* petition to the Third Circuit, which granted Mr. Campbell's application for a certificate of appealability and appointed the undersigned as *pro bono* counsel. The certificate listed three issues.[3] The paramount issue was whether Rule 8 constitutes an "adequate and independent" state procedural rule. During oral argument, the three-judge panel of the court of appeals questioned counsel for Mr. Campbell at length regarding the "independence" of Rule 8 in light of Rule 8's "plain- error" component.

After argument, the Third Circuit affirmed the judgment of the district court and concluded, *inter alia*, that Rule 8 was "independent" of federal law. The court followed the First, Fourth, Sixth, Seventh and Eleventh Circuits, which ostensibly conclude that a state court can review an otherwise waived federal claim for plain error and still have its decision deemed "independent" of federal law.

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[3] The Third Circuit certified the following issues for appeal: (1) whether Delaware Supreme Court Rule 8 is an independent and adequate state ground that precludes federal *habeas* review; (2) whether the District Court properly discerned all of the ineffective assistance of counsel claims that Campbell presented to the state court and included in his § 2254 petition; and (3) whether the Delaware Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 697 (1984) was unreasonable where it denied Campbell's claims because he "presented no *evidence* that any claimed error on the part of his counsel resulted in prejudice to him." (Emphasis in original).

REASONS FOR GRANTING THE WRIT

The Court should issue a writ to resolve the split on the issue presented in this case: Whether a state court's application of a state procedural rule is "dependent" upon federal law when the state court reviews the merits of an otherwise waived federal claim for "plain error." The federal courts of appeals have been split for some time. As a result of the decision below, the split is now six to five. This Court should bring uniformity to this important and recurring issue.

I. THE THIRD CIRCUIT IMPLICITLY REJECTED THE HOLDINGS OF THE SECOND, FIFTH, EIGHTH, NINTH AND TENTH CIRCUITS THAT PLAIN-ERROR REVIEW OF AN OTHERWISE WAIVED FEDERAL CLAIM IS "DEPENDENT" UPON FEDERAL LAW.

The holding of the court below is in direct conflict with decisions of the Second, Fifth, Eighth, Ninth and Tenth Circuits. In adopting the position previously accepted by the First, Fourth, Sixth, Seventh and Eleventh Circuits, and implicitly disagreeing with five other circuit courts, the Third Circuit has expanded a clear conflict among the courts of appeals on an important and recurring issue.

A. The federal courts of appeals are split.

As recently as 2005, the Second Circuit concluded that an exception to New York's "contemporaneous-objection" rule, which permits courts to review the merits of otherwise waived claims for "fundamental errors that impair the validity of the proceeding," is not "independent" of federal law if the state courts invoke the exception to review the merits of an otherwise waived federal claim. In *Brown v. Greiner*, 409 F.3d 523, 532 (2d Cir. 2005), the Second Circuit

noted that the state court's decision "was dependent on the court's finding that the [constitutional] claim was without merit." *Id.* This exception is similar to a "plain-error" exception.

Likewise, the Fifth Circuit in *Plunkett v. Estelle*, 709 F.2d 1004, 1007 (5th Cir. 1983), held that a state court's review for "fundamental error" of a defendant's objection to the judge's charge to the jury – even though the defendant failed to object at trial – had "no impact" on the federal courts' review of the claim. The Fifth Circuit stated that even if the federal courts' review of the claim would be confined to the level of review conducted by the state court (i.e., a review for "fundamental error"), there was no procedural bar to reviewing the claim because the state court reached the merits. This exception is also similar to a "plain-error" exception.

The Eight Circuit has concluded that reviewing the merits of an otherwise waived federal claim under a "plain-error" exception to a waiver rule is not "independent" of federal law. In *Thomas v. Bowersox*, 208 F.3d 699, 701 (8th Cir. 2000), the court stated that "state court review of a claim for plain error does not preclude later consideration of the same argument in a collateral proceeding in federal court."[4]

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[4] There appears to be a split within the Eighth Circuit that has not been resolved by the court *en banc*. Significantly, the view that a plain-error review of a federal claim is "independent" of federal law was the view of the Eighth Circuit *before* the AEDPA became law on April 24, 1996. *Toney v. Gammon*, 79 F.3d 693, 698-99 (8th Cir. 1996) ("[A] properly limited plain error review by a state court does not cure procedural default."). Since the enactment of the AEDPA, though, the Eighth Circuit follows the position advocated by Petitioner in this case and has stated that (1) plain-error review by state courts

Similarly, the Ninth Circuit has held that a review of a constitutional claim on the merits for "plain error" is not independent of federal law. *Walker v. Endell*, 850 F.2d 470 (9th Cir. 1987):

> [W]e conclude that the purpose of the cause and prejudice determination permits us to consider a claim on federal *habeas* that has been reviewed by a state appellate court on the merits for plain error. Although applying a different standard of review than it would on direct appeal, a state appellate court reviewing for plain error reaches the merits of a petitioner's claim. Our policy of providing an opportunity for state courts to correct constitutional errors before a petitioner may seek relief in federal court permits us to review for error where the state court has in fact undertaken such review. No disrespect of the state court conviction may be implied from a review that a state appellate court itself has undertaken.

Id. at 474. *See also Washington v. Cambra* 208 F.3d 832, 833 (9th Cir. 2000) (same rationale for state-court review of a waived claim for "constitutional error").

Finally, in *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003), the Tenth Circuit acknowledged the split of authority among the circuits and concluded that the "substance of the plain-error disposition" determines whether the

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of a federal claim allows federal courts to conduct the same review; and (2) this approach is consistent with the AEDPA. *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (noting that plain-error review by federal court, mirroring how the state court reviewed the claim, is consistent with the deferential standard of review under the AEDPA for state-court decisions).

state court's procedural decision is "independent" of federal law:

> A state court may deny relief for a federal claim on plain-error review because it finds the claim lacks merit under federal law. *In such a case, there is no independent state ground of decision and, thus, no basis for procedural bar. See Hux v. Murphy*, 733 F.2d 737, 739 (10th Cir. 1984) (following approach we adopt here, though without consideration of analytical complexities subsequently added by Harris and AEDPA). Consistent with that conclusion, the state court's disposition would be entitled to § 2254(d) deference because it was a form of merits review.

Id. at 1205-06 (emphasis added).[5] *See also Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003) ("Because the state court denied relief on the

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[5] The Tenth Circuit stated that "Courts addressing this question have arrived at very different answers."

> The Sixth and Seventh Circuits apply procedural bar to state plain error review. *See Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001); *Thomas v. Gilmore*, 144 F.3d 513, 518 (7th Cir. 1998). The Ninth Circuit holds otherwise, concluding that state court plain error review is a merits determination that allows the federal court also to conduct a merits review. *See Walker v. Endell*, 850 F.2d 470, 474 (9th Cir. 1987). The Eighth Circuit has inconsistent case law. See *Simmons v. Taylor*, 195 F.3d 346, 348 (8th Cir. 1999) (citing *Sweet v. Delo*, 125 F.3d 1144, 1152 (8th Cir. 1997)). The Second Circuit appears to side with the Sixth and Seventh Circuits, but qualifies its position by holding that if the state plain-error review incorporated federal law, the resultant disposition would not rest on the "independent state ground" necessary to support a procedural bar. *See Roy v. Coxon*, 907 F.2d 385, 389-91 (2d Cir. 1990).

Cargle, 317 F.3d at 1205-06 & n.7.

merits of the federal claim on plain-error review, procedural-bar principles do not apply.").

Decisions of the First, Fourth, Sixth, Seventh, Eleventh and now the Third Circuits are in direct conflict with the Second, Fifth, Eighth, Ninth, and Tenth, as the Third Circuit tacitly acknowledged. *Campbell v. Burris*, 515 F.3d 172, 178 (3d Cir. 2007) ("[W]hile the United States Supreme Court has not definitively resolved the matter, there is ample court of appeals case law on whether invocation of similar 'plain error' review of alleged violations of the federal constitution in order to mitigate the effect of a state procedural default rule will suffice to deprive a state court ruling of its "independent" character. We agree with our sister Courts of Appeals for the First, Fourth, Sixth, Seventh, Tenth[6] and Eleventh Circuits that it does not.").

The First Circuit has held that reviewing an otherwise waived federal claim on the merits to determine whether a "miscarriage of justice" occurred is independent of federal law. *See Gunter v. Maloney*, 291 F.3d 74, 80 (1st Cir. 2002). The court in *Gunter* stated that the "mere fact that a state appellate court engages in a discretionary, and necessarily cursory, review under a 'miscarriage of justice' analysis does not in itself indicate that the court has determined to waive an independent state procedural ground for affirming the conviction." *Id.*

The Fourth Circuit shares a similar view. It has concluded that reviewing an otherwise

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[6] The Third Circuit listed the Tenth Circuit as espousing a view that was consistent with the First, Third, Fourth, Sixth, Seventh and Eleventh Circuits. On closer review, however, the Tenth Circuit's view is more closely aligned with the Second, Fifth, Eighth and Ninth Circuits.

waived federal issue to determine whether the claimed error "so infected the trial with unfairness as to make the resulting conviction a denial of due process" is independent of federal law. *Daniels v. Lee*, 316 F.3d 477, 487 (4th Cir. 2003).

In the Sixth, Seventh and Eleventh Circuits, a state court's review on the merits of an otherwise waived federal claim for "plain error" is independent of federal law. *Scott v. Mitchell*, 209 F.3d 854, 865-66 (6th Cir. 2000) (Ohio's "plain-error" exception); *Neal v. Gramley*, 99 F.3d 841, 844 (7th Cir. 1996) (Illinois' "plain-error" exception); *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988) ("the mere existence of a 'plain error' rule does not preclude a finding of procedural default").

In sum, the conflict in the circuits is clear and direct. The courts of appeals that have reached the issue have held steadfast to their conclusions even as the law of other circuits has developed to the contrary. The split evidences an engrained disagreement on an issue of law, and this Court should grant review to bring uniformity to the issue.

B. The split may be an unintended consequence of competing principles in this Court's decisions.

The Court has discussed the "independence" of state-court decisions. As a general rule, when a state court reviews the merits of a federal claim, the federal court may do the same, as there is no reason to defer to a state court's decision on federal law. *See Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989) ("[I]f the state court under state law chooses not to rely on a procedural bar ... then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim.").

When state rules have dual components – a procedural component and an exception that permits review of the merits anyway – the analysis becomes only slightly more complicated. As a general rule, if it is unclear whether the state court relied on state or federal law, federal *habeas* courts may presume that the state relied on federal law and therefore review the claim. *Harris*, 489 U.S. at 260-62 (adopting a "plain statement" requirement to determine whether a state court decided the case based on state or federal law).

Consistent with these principles, the Court has held that application of a built-in exception to a waiver rule that permits review of an otherwise waived federal claim is dependent upon a ruling on federal law and therefore cannot form the basis to deny a federal *habeas* court the ability to review the claim. *Stewart v. Smith*, 536 U.S. 856 (2002) (*per curiam*); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Engle v. Isaac*, 456 U.S. 107,135 n.44 (1982) ("If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review."); *County of Ulster v. Allen*, 442 U.S. 140, 150-152 & n. 10 (1979).

The Court, on the other hand, has said that a state court "need not fear reaching the merits of a federal claim in an *alternative* holding ... as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision." *Harris*, 489 U.S. at 264-265 & n.10. Likewise, the Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), has suggested that a state may decide whether a constitutional right will be violated *if* it refuses to review a claim. *Id.* at 741-42 ("[T]he Virginia Supreme Court will only grant an extension of time if *the denial itself* would abridge a constitutional right.") (emphasis added).

The holdings of the Second, Fifth, Eight, Ninth and Tenth Circuits conform to the view in *Stewart*; *Ake; Engle* and *County of Ulster*. The First, Third, Fourth, Sixth, Seventh and Eleventh Circuits are more closely aligned with the view of *Harris* and *Coleman* (even though the courts have arguably applied the holdings in those cases incorrectly).

Because five circuit courts seem to follow one line of this Court's reasoning and six others seem to follow a different line, the Court should step in and resolve the disparity.

C. The split on this important and recurring issue is intolerable.

Many states have some form of an exception to a waiver rule.[7] As a result of the Third Circuit's decision in this case (joining five circuits and implicitly rejecting five others), any state court within the Third Circuit may invoke those rules, simply by citing them, and greatly limit the ability of the federal courts in *habeas* cases to decide federal questions. For example, if

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[7] *See, e.g.*, CONN. PRACTICE BOOK § 60-5 ("The Court may in the interests of justice notice plain error not brought to the attention of the trial court."); HAW. R. APP. PROC. 28, 40.1 (appellate courts, and supreme court on certiorari, "at [their] option, may notice a plain error not presented [at trial]"); KS. SUP. CT. R. 8.03 ("the [appellate] court may, however, at its option, address a plain error not presented [at trial]."); MD. R. PRO. 4-325 ("An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object [at trial]."); MO. SUP. CT. R. 84.13 ("Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court ...."); NEB. REV. STAT. § 25-1919 ("The Court of Appeals or Supreme Court may at its option consider a plain error not specified in appellant's brief."). This is just a sampling of state rules worded most closely to DEL. SUP. CT. R. 8 which, like Rule 8, permit discretionary review of a claim despite a procedural misstep.

a state court invokes a procedural rule that allows plain-error review of an otherwise waived federal claim, a state court can review federal claims and circumvent subsequent review by a federal court. The Court should intervene to determine whether state courts should be able to exercise such influence over the ability of federal courts to decide federal questions.

The split also represents different views on comity and federalism, the linchpins of the doctrine of adequate and independent state procedural grounds. Under the Third Circuit's view (shared by five other circuits), if a state court reviews a federal claim on the merits for "plain error," the decision is somehow still independent of federal law even when, in fact, a state court decides a federal question. This rationale suggests that comity for state-court decisions is paramount to the federal courts' having the ability to decide federal questions in a *habeas* case. The Court should determine whether comity should be read so broadly that, in *habeas* cases filed by state inmates, the federal courts have in essence lost their time-honored authority to be the arbiters of what federal law means.

The split, moreover, is intolerable. There are more than one million prisoners incarcerated by the states.[8] All state prisoners have the right to pursue federal *habeas* remedies. Each year, many thousands of *habeas* petitioners (often *pro se*) may or may not lose their right to pursue federal *habeas* review depending on the law of the circuit they are in. If a state court decides a federal question despite a procedural default, a

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[8] William J. Sabol *et al.*, Bureau of Just. Stat., U.S. Dep't of Just., Bulletin No. NCJ 217675, Prison and Jail Inmates at Midyear 2006, at 2 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf.

habeas petitioner should be able safely to assume that a federal court may thereafter decide that federal question. However, if a *habeas* petitioner is in one of twenty-two states in the First, Third, Fourth, Sixth, Seventh or Eleventh Circuits,[9] he would be barred from presenting a federal claim to a federal court, even though it was decided by state courts under a plain-error standard. If a *habeas* petitioner is in one of twenty-eight states in the Second, Fifth, Eight, Ninth and Tenth Circuits, he would not.[10] Such a broad and entrenched disparity with respect to federal *habeas* jurisprudence is intolerable.

II. THE THIRD CIRCUIT ERRED IN ITS CONCLUSION THAT DELAWARE SUPREME COURT RULE 8 IS AN "INDEPENDENT" STATE RULE.

The Third Circuit's decision conflicts with *County of Ulster*, *Engle*, and *Ake* because a decision by the Delaware Supreme Court under Rule 8's plain-error component is a merits-based decision on a federal question.

As explained by the Delaware Supreme Court itself, Rule 8 allows review of any claim for "plain error," which includes "constitutional" claims. Under Delaware law, "plain error" is

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[9] The states in these circuits include Maine, Massachusetts, Rhode Island, New Hampshire, Pennsylvania, New Jersey, Delaware, West Virginia, Virginia, North Carolina, South Carolina, Maryland, Ohio, Kentucky, Tennessee, Michigan, Wisconsin, Illinois, Indiana, Alabama, Georgia and Florida.

[10] The states in these circuits include New York, Connecticut, Vermont, Texas, Louisiana, Mississippi, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Arkansas, California, Washington, Montana, Idaho, Oregon, Nevada, Arizona, Alaska, Hawaii, Wyoming, Oklahoma, Utah, Colorado, New Mexico and Kansas.

error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." The "substantial rights of the claimant" has been interpreted by Delaware courts to mean his "constitutional" rights. *See Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) ("[W]e have reserved the plain error standard to claims affecting substantial rights, i.e. of constitutional dimension, because only such claims can be said to jeopardize the fairness and integrity of the trial process.") (internal quotation omitted)).

For this reason, Rule 8's "plain-error" review is not, *per se*, "independent" of federal law as the Third Circuit suggested, nor is it "independent" as applied in Mr. Campbell's case. The Third Circuit acknowledged that Mr. Campbell raised "federal constitutional claims" in his *habeas* papers (virtually the same ones he raised in state court), which the Delaware Supreme Court reviewed under Rule 8's plain-error component. *Campbell*, 515 F.3d at 175 ("His petition and accompanying memorandum of law alleged ineffective assistance of counsel on a number of grounds and an assortment of six other violations of his federal constitutional rights.").

The state court's decision in this case may have been independent of federal law if (1) it explicitly stated its state procedural ruling governed and that, *in the alternative*, Mr. Campbell's claims lacked merit, *see Harris*, or (2) the court explicitly stated that it would determine whether declining to review the merits would work a prospective constitutional violation. *See Coleman*. However, the Delaware Supreme Court never explicitly stated that Rule 8 procedurally barred Mr. Campbell's claims. Nor did the Delaware Supreme Court decide, pursuant to *Coleman*, whether application of

Rule 8's procedural bar of his claims would result in some constitutional violation.

Consequently, Rule 8 is not "independent" of federal law, either *per se* or as applied in this case.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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May 12, 2008

Appendix A – Third Circuit's Opinion

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5156

JAMAR L. CAMPBELL,

Appellant

v.

ACTING WARDEN ELIZABETH BURRIS, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Before: FISHER, STAPLETON and COWEN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Appellant Jamar Campbell was convicted by a jury in 2001 of possession of crack cocaine with intent to deliver and possession of cocaine within three hundred feet of a park. He appealed his conviction to the Supreme Court of Delaware, which affirmed. After unsuccessfully seeking post-conviction relief in the Superior and Supreme Courts of Delaware, Campbell, acting pro se, filed this *habeas* proceeding under 28 U.S.C. § 2254 in the District Court. His petition and accompanying memorandum of law alleged

ineffective assistance of counsel on a number of grounds and an assortment of six other violations of his federal constitutional rights.[1] The District Court concluded that all of Campbell's claims other than his ineffective assistance of counsel claims were unreviewable because the Delaware Supreme Court had rejected them pursuant to Delaware Supreme Court Rule 8, which provided an independent and adequate state law ground supporting that Court's judgment. Therefore, the Court reviewed those claims only for "cause and prejudice" or a "miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 749-50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). With respect to Campbell's ineffective assistance of counsel claims, the District Court held (1) that Campbell had failed to exhaust three of them in the state courts and had not shown cause and prejudice or

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[1] The District Court summarized Campbell's claims as follows:

> (1) numerous allegations that defense counsel provided ineffective assistance; (2) prosecutorial misconduct, stemming from the prosecutor's prejudicial remarks made throughout the trial; (3) the trial court erred by not curing the effect of the improper prosecutorial statements, by permitting suggestive and perjured testimony to occur, by asking Campbell improper and prejudicial questions, and by disclosing Campbell's past record; (4) the State changed the elements of the charges in the indictment, causing a structural defect in the trial, and therefore violated his rights to due process and a fair trial; (5) the State did not prove the elements of the charged offenses beyond a reasonable doubt, and there was insufficient evidence to sustain his convictions; (6) the evidence at trial had been tampered with; and (7) the jury instructions were improper.

Campbell v. Carroll, 2005 WL 2917466, *4 (D.Del. Nov.4, 2005).

a miscarriage of justice, and (2) that the Delaware Supreme Court's rejection of the remainder was neither contrary to, nor an unreasonable application of, clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1).

This Court granted Campbell's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1) with respect to the following issues: "(1) is Delaware Supreme Court Rule 8 an independent and adequate state ground that precludes federal *habeas* review ... (2) did the District Court properly discern all of the ineffective assistance of counsel claims that Campbell presented to the state court, ... and (3) was the Delaware Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) unreasonable." App. at 21a-22a. We also granted his application for appointment of counsel. We conclude (1) that Delaware Supreme Court Rule 8 provides an independent and adequate state law ground for the Delaware Supreme Court's judgment, (2) that any error of the District Court in rejecting three of Campbell's claims of ineffective assistance of counsel as unexhausted was harmless, and (3) that the Delaware Supreme Court's application of Strickland was not unreasonable.

I. Delaware Supreme Court Rule 8

Delaware Supreme Court Rule 8 provides:

> Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

DEL. SUPR. CT. R. 8.

On Campbell's direct appeal, the Supreme Court of Delaware expressly invoked Rule 8 in the disposition of all of Campbell's claims other than his ineffective assistance of counsel claims. After ruling that Campbell's ineffective assistance claims would have to be pursued in a post-conviction relief proceeding, the Court turned to the first of the remaining six claims and ruled as follows:

> We review this claim, as well as the rest of Campbell's claims, for plain error, since he raises them for the first time in this appeal. SUPR. CT. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.1986). Plain error is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.*

Campbell v. State, 801 A.2d 10 (Del.2002). The Court held that all six of these claims failed to pass the "plain error" test.

As this ruling and the citation to *Wainwright* indicate, the "interest of justice exception" to Rule 8 has been interpreted in the context of criminal litigation to call for what the Delaware Supreme Court terms a "plain error" analysis. *Wainwright* explains this concept as follows:

> Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Dutton v. State*, Del. Supr., 452 A.2d 127, 146 (1982). Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an

> accused of a substantial right or which clearly show manifest injustice.

Wainwright, 504 A.2d at 1100.

As the Delaware Supreme Court's opinions in *Wainwright* and this case indicate, this "plain error" rule is a state law rule and is applied without reference to federal case law. *See Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

A federal *habeas* court may not address the merits of a procedurally-defaulted claim if the state court opinion includes a plain statement indicating that the judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" support for the court's decision. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). As we have explained:

> [a] state rule provides an independent and adequate basis for precluding federal review of a claim if the "rule speaks in unmistakable terms[,] all state appellate courts refused to review the petitioner's claim on the merits [, and] the state courts' refusal [was] consistent with other decisions," that is, the procedural rule was "consistently and regularly applied." *Doctor v. Walters*, 96 F.3d 675, 683-84 (3d Cir.1996).

Albrecht v. Horn, 485 F.3d 103, 115 (3d Cir. 2007). The question before us is whether the Delaware Supreme Court's application of its Rule 8 in Campbell's case was "independent" of the merits of his federal claims and "adequate" support for its judgment.[2]

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[2] We have not previously had occasion to resolve this issue. Contrary to Campbell's suggestion, *Reynolds v. Ellingsworth*, 843 F.2d 712 (3d Cir.1988), does not rule

A. Independence

When, as here, a state court expressly relies on a state procedural rule of preclusion as a basis for its decision, the independence issue turns on whether the state law alone provides everything necessary to support the court's judgment. Even when the state court decision rests on alternative holdings, one based on federal law and the other based on a state procedural rule of preclusion, for example, the court's reliance on federal law does not deprive the state rule of its independence if the state rule is sufficient alone to support the judgment. *Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982).[3]

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upon it. In that case, the Supreme Court of Delaware had held that Reynolds had procedurally defaulted a claim by failing to move for a mistrial. While there was no court rule requiring such a motion, the Delaware Supreme Court interpreted its prior decision in *Conyers v. State*, a case decided after Reynolds' trial, as holding that all issues were foreclosed in post-conviction relief proceedings in Delaware unless there was a contemporaneous objection or the petitioner had shown cause and prejudice of the kind required by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). We reversed the District Court's denial of *habeas* relief and held that Conyers did not provide an independent and adequate ground supporting Reynolds' conviction. We did so because (1) "[w]hether enunciated by court rule or case law, there was no Delaware procedural rule on point, and therefore Reynolds violated none," *Reynolds*, 843 F.2d at 720; and (2) "[t]he history of [Delaware post-conviction relief jurisprudence] belie[d] the sweeping proposition that a procedural bar exists to all claims raised for the first time in" such a proceeding. *Id.* While we there referred to Delaware Supreme Court Rule 8 in the course of our analysis, contrary to Campbell's suggestion, we did not identify any inconsistency in its application.

[3] Campbell insists that the Delaware Supreme Court "actually reviewed" the merits of his federal claims other than his ineffective assistance of counsel claims. If the Delaware Supreme Court had not made a plain statement that it "relied independently on a violation of a state

While the Delaware Supreme Court when applying Rule 8 in this context of criminal litigation must, of course, be cognizant of the nature of the alleged federal constitutional violation, federal law is not essential to support its judgment. The Court is applying state, not federal, law and it can apply that state law without resolving the merits of the federal constitutional issue. Delaware case law establishes that the issue of whether the alleged error in the context of this particular case was "apparent on the face of the record" and "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial

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procedure," but rather had "based [its] decision on the merits of the claim," the District Court would not have been barred from reaching those claims in the course of its *habeas* review. *Harris v. Reed*, 489 U.S. 255, 261-62, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). *See also Johnson v. Pinchak*, 392 F.3d 551, 557 (3d Cir. 2004). However, the Delaware Supreme Court did make a "plain statement" that Rule 8 applied to each of those claims and then proceeded to examine each under the standards applicable to Rule 8's "interests of justice" exception. The Court concluded that each claim, in turn, did not involve "plain error." *Campbell v. State*, 801 A.2d 10 (Del. 2002). While it is true, as Campbell stresses, that the Court found Campbell's appeal "wholly without merit" and stated that his perjured testimony was "meritless," this does not detract from the independence of the "no plain error" ruling on each of Campbell's claims. Even if one reads those statements as references to the underlying merits of the claims under federal law, as we explained in *Caruso*, alternative holdings based on federal law do not deprive a state law ruling of its independence. Moreover, given that Delaware's Rule 8 jurisprudence requires a showing both that the error is "apparent on the face of the record" and that the fairness and integrity of the trial process has been compromised, when the Delaware Supreme Court, as here, uses a phrase like "no merit" in the context of its "plain error" analysis, it is best understood as a declaration that no error is perceived on the face of the record and a fortiori no "plain" error. *See, e.g., Dutton v. State*, 452 A.2d 127, 146 (Del. 1982) ("We fail to find any error ..., much less plain error.").

process" are issues governed by Delaware law. And those issues may be resolved by assuming arguendo the merit of the federal claim. In these respects, the situation before us is much like that before the Court of Appeals for the Seventh Circuit in *Willis v. Aiken*, 8 F.3d 556 (7th Cir. 1993). The Court there posed the issue before it in the following manner:

> The Indiana postconviction appellate court addressed federal constitutional concerns in analyzing the appropriateness of the jury instruction. As we have just noted, however, it did so in the context of determining whether waiver of the issue through failure to object ought to be forgiven because the instruction constituted "fundamental error." We must now determine whether, in this procedural context, the Indiana appellate court's judgment can be said to rest on an independent and adequate state law ground or whether the determination of "no fundamental error" is so "interwoven," *Coleman*, 501 U.S. at 735, 111 S.Ct. at 2557, with the federal claim as to justify federal review without a demonstration of cause and prejudice.

Willis, 8 F.3d at 562.

The *Willis* Court's ensuing description of the case law dealing with the Indiana "fundamental error" doctrine is an accurate description of the Delaware "plain error" jurisprudence under Rule 8:

> These cases demonstrate that the principle of fundamental error in Indiana law involves an assessment not only of the substantive rights at stake but also of their impact on the particular trial. While

> there have been occasions in which Indiana courts have looked to a federal court's assessment of federal rights to "corroborate" its own assessment, *see Winston v. State*, 165 Ind.App. 369, 332 N.E.2d 229, 233 (1975), there is no discernible pattern of dependency on federal court assessment of a particular error as "fundamental." Rather, the term, as employed in the Indiana cases, appears to be a term of art employed on a fact-specific basis for the purpose of determining whether to excuse noncompliance with the requirement that a timely objection be made on the record.
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> * * *
>
> Indiana mandates review on the merits of fundamental rights claims only when the denial of the right "gives rise to a question of fundamental error as *defined by state law*." *Gutierrez*, 922 F.2d at 1469 (emphasis supplied).

Willis, 8 F.3d at 556, 567.

Delaware's "plain error" exception to Rule 8 is not unique. Many states have procedural default rules with similar "safety valves" for situations in which enforcing the procedural default would work a serious injustice. *Neal v. Gramley*, 99 F.3d 841, 844 (7th Cir. 1996). As a result, while the United States Supreme Court has not definitively resolved the matter, there is ample court of appeals case law on whether invocation of similar "plain error" review of alleged violations of the federal constitution in order to mitigate the effect of a state procedural default rule will suffice to deprive a state court ruling of its "independent" character. We agree with our sister Courts of Appeals for the First, Fourth,

Sixth, Seventh, Tenth and Eleventh Circuits that it does not. *Gunter v. Maloney*, 291 F.3d 74, 80 (1st Cir. 2002) ("mere fact that a state appellate court engages in a discretionary, and necessarily cursory, review under a 'miscarriage of justice' analysis does not in itself indicate that the court has determined to waive an independent state procedural ground for affirming the conviction"); *Daniels v. Lee*, 316 F.3d 477, 487 (4th Cir. 2003) (federal court procedurally barred from considering claim where state court merely reviewed whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *Scott v. Mitchell*, 209 F.3d 854, 865-66 (6th Cir. 2000) (that Ohio Supreme Court reserved discretion, in exceptional cases, to review for plain error an alleged violation of the federal constitution that would otherwise be barred by its contemporaneous objection rule does not preclude that rule from serving as an independent state law ground); *Neal*, 99 F.3d at 844 ("Illinois like many states provides a safety valve for situations in which enforcing a procedural default would mask a plain error. To decide whether an error is plain requires consideration of the merits-but only so far as may be required to determine that issue. It does not open up the merits any wider for consideration by the federal court.") (internal citations omitted); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) ("a state court [can] deny relief for what it recognizes or assumes to be federal error, because of the petitioner's failure to satisfy some independent state law predicate. In such a case, that non-merits predicate would constitute an independent state ground for decision which would warrant application of procedural-bar principles on federal *habeas*."); *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988) ("the mere existence

of a 'plain error' rule does not preclude a finding of procedural default"). *Cf. Osborne v. Ohio*, 495 U.S. 103, 123, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (where state court reviewed claim for plain error citing exclusively state law, "we have no difficulty agreeing with the State that Osborne's counsel's failure to [contemporaneously object] constitutes an independent and adequate state-law ground preventing us from reaching [the claim]"); *Roy v. Coxon*, 907 F.2d 385, 391 (2d Cir. 1990) (distinguishing Osborne and concluding that, where state court cited to and relied on federal law in its plain error review, claim not procedurally defaulted). *But see Walker v. Endell*, 850 F.2d 470, 474 (9th Cir. 1988).

Thus, our case, like *Willis*, is one in which the applicable state law is not dependent on a federal law. It is unlike *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), where the "escape valve" for the procedural default rule was phrased in terms of fundamental trial error and, under Oklahoma law, all federal constitutional errors were "fundamental." As the Supreme Court explained in *Ake*, that was a situation in which "the state made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error had been committed. Before applying the waiver doctrine to a constitutional question, the state court [was required to] rule, either explicitly or implicitly, on the merits of the constitutional question." *Id.* at 75, 105 S.Ct. 1087.

Rule 8, as applied by the Delaware Supreme Court in this case, was "independent" of federal law.

B. Adequacy

A state procedural rule is "adequate" to bar federal *habeas* review only if it is "firmly established and regularly followed" by the state courts at the time of the petitioner's trial. *Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). This rule is intended both to ensure that state courts do not insulate disfavored claims from federal review, and to ensure that federal *habeas* review is not barred unless petitioners have fair notice of the steps they must take to avoid default. *Bronshtein v. Horn*, 404 F.3d 700, 707-08 (3d Cir. 2005); *Dugger v. Adams*, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) ("state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims"). In applying these principles, this Court seeks to determine whether the state rule itself provides guidance regarding how the rule should be applied or whether such standards have developed in practice. *See, e.g., Doctor v. Walters*, 96 F.3d 675, 684-85 (3d Cir. 1996) (because the rule on its face provided little or no guidance regarding the application of the rule to the present facts, examining the case law to determine whether the rule, at the time of its application to petitioner, was "firmly established and regularly applied"). However, "neither an occasional act of grace by a state court ... nor a willingness in a few cases to overlook the rule and address the claim on the merits" renders a rule inadequate. *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997). A rule can be adequate if the state supreme court faithfully applies it in "the vast majority" of cases. *Dugger*, 489 U.S. at 410 n. 6, 109 S.Ct. 1211.

Rule 8 and the case law interpreting it served clear notice on Campbell and his trial counsel in "unmistakable terms" that an issue not presented to the trial court would not be considered on appeal unless the alleged error was so prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Wainwright v. Sykes*, 433 U.S. 72, 85, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Moreover, Campbell does not, and cannot, claim that the Supreme Court of Delaware as of 2001 regularly ignored this state rule when presented with an issue not fairly presented to the trial court. Based on our review of its application of this rule,[4] as of the time of Campbell's trial in 2001, it appears that, when confronted with an issue raised for the first time on appeal, the Court virtually always relied upon Rule 8 in some manner.[5] In the vast majority of such cases, it

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[4] According to Westlaw, the Delaware Supreme Court cited Rule 8 in 224 cases prior to the end of 2001. While we have not read all of these cases, we have studied all of the cases cited by the parties and a fair sampling of the remainder.

[5] Between 1973 and 1991, the Delaware Supreme Court on at least five occasions did address the merits of sufficiency of evidence issues not presented to the trial court without mentioning Rule 8. In 1992, however, the Court noted this aberration from its general practice and applied Rule 8 to bar review of a sufficiency of evidence issue in *Gordon v. State*, 604 A.2d 1367 (Del. 1992). Since that time, *Gordon* has been held to establish that Rule 8 bars review of sufficiency of evidence issues not fairly presented to the trial court unless "the trial court committed plain error requiring review in the interest of justice." *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (finding plain error); *Liket v. State*, 719 A.2d 935 (Del. 1998) (applying *Gordon* and finding no plain error). *Liket* and *Monroe* are also consistent with a substantial line of unpublished cases. *See, e.g., Andrews v. State*, 781 A.2d 692 (Del. 2001); *Cooper v. State*, 679 A.2d 469 (Del. 1996); *Wimbley v. State*, 660 A.2d 396 (Del. 1995), *Dickson v. State*, 653 A.2d 304 (Del. 1994); *Worley v. State*, 633 A.2d

held that review was precluded by the Rule. The Court occasionally, but infrequently merely cited Rule 8 and found the claim waived or defaulted, without further discussion. *See, e.g., Wade Insulation, Inc. v. Visnovsky*, 773 A.2d 379, 382 n. 3 (Del. 2001); *Manley v. State*, 709 A.2d 643, 655 (Del. 1998); *Marine v. State*, 624 A.2d 1181, 1186 (Del.1993);[6] it also frequently engaged in plain error review and with a few sentences of explanation, found none. *See, e.g., Weedon v. State*, 647 A.2d 1078, 1082-83 (Del. 1994); *Gattis v. State*, 637 A.2d 808, 820 (Del. 1994). As one would expect given the requirements of the plain error test, the Court occasionally, but rarely, concluded that the test was satisfied and proceeded to resolve the merits of the claim. *See, e.g., Lewis v. State*, 757 A.2d 709, 712 (Del. 2000) (invoking the "interests of justice" exception because, on appeal, defendant raised "important questions" relating to the Sixth Amendment and "fundamental fairness in the administration of justice"; finding violations); *Reynolds v.*

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372 (Del. 1993); *Thomas v. State*, 628 A.2d 84 (Del. 1993). In contrast, we have found no case decided since 1991 involving a sufficiency of evidence issue not fairly presented to the trial court where the Supreme Court addressed the merits without reference to Rule 8. Accordingly, we conclude that, by the time of Campbell's trial in 2001, Rule 8 was "firmly established and regularly followed" by the Delaware Supreme Court in sufficiency of evidences cases. Campbell had ample notice from a line of cases decided over the preceding decade that if he failed to raise his sufficiency of evidence claim before the trial court, he could secure review only if the alleged error was so prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process

[6] The absence of an "interest of justice" analysis in these cases does not, of course, suggest that Rule 8 is anything other than "adequate." In each, as in Campbell's case, the Rule was applied to preclude review. In none is there an indication that an interest of justice exception was being urged upon the Court.

Ellingsworth, 843 F.2d 712, 721-22 (3d Cir. 1988) (collecting cases). Importantly, we have been referred to, and have found, no cases in which the Delaware Supreme Court's plain error analysis has led to inconsistent results.

With the exception of the 1973-1991 insufficiency of evidences cases referenced in Gordon, we have been referred to, and have found, no case in which the failure to fairly present an issue to the trial court was ignored and the merits addressed without reference to Rule 8. In *Nelson v. State*, 628 A.2d 69 (Del. 1993), the Delaware Supreme Court noted that one of the state's arguments was based on Rule 8 and then proceeded to address the merits of the appellant's claimed error without expressly addressing that argument. The Court ultimately concluded that, while the trial court had committed error (by admitting evidence of a DNA match in this rape case while excluding the statistical evidence necessary to permit the jury to evaluate it), the error was harmless. The appellant had objected in the trial court to the admission of all of the DNA evidence, and the Court may have regarded Rule 8 as not applicable. It did not expressly say so, however. As far as we have been able to determine, this is as close as the Delaware Supreme Court came to ignoring Rule 8 in a case in the decade preceding Campbell's trial.

In the final analysis, Campbell's argument on "adequacy" boils down to his insistence that a "discretionary procedural rule such as Rule 8 cannot be 'adequate' for purposes of procedural default." Appellant's Br. at 18. If accepted, this proposition that a state procedural rule is rendered *per se* inadequate merely because it allows for some exercise of discretion by state courts would all but vitiate the long-standing doctrine of procedural default in the federal

habeas context. As we have earlier noted, numerous Courts of Appeals cases have sustained the validity of state procedural bar rules having "safety valves" which involve exercise of the same kind of discretion required by the "interest of justice" exception to Rule 8. *See also, e.g., Wedra v. Lefevre*, 988 F.2d 334, 340 (2d Cir. 1993) ("[w]e are not convinced that simply because New York law allows some discretion to be exercised in the granting of extensions that a dismissal on the basis of untimeliness does not constitute an adequate procedural bar"); *Hutchison v. Bell*, 303 F.3d 720, 738 (6th Cir. 2002) (due process exception does not render state rule inadequate for federal procedural default as long as discretion is not unfettered); *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990) (state rule allowing court to disregard procedural bar for "sufficient reason" is not necessarily inadequate); *Wood v. Hall*, 130 F.3d 373, 376-77 (9th Cir. 1997) (that "the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision"). The issue is not whether the state procedural default rule leaves room for the exercise of some judicial discretion-almost all do. Rather, the issue is whether, at the relevant point in time, the judicial discretion contemplated by the state rule is being exercised in a manner that lets people know when they are at risk of default and treats similarly-situated people in the same manner. Our review of Delaware Supreme Court Rule 8 law convinces us that it performs both of these functions.

Campbell cites very little in support of his condemnation of discretion. He complains that "the Delaware Supreme Court frequently exercises its discretion under Rule 8 to review federal claims raised for the first time on appeal" but the cases he cites, by his own

acknowledgment, "present[ed] fundamental constitutional problems" which the Delaware Supreme Court found to satisfy the "plain error" standard. Appellant's Br. at 19. We do not agree that this happens "frequently," but, in any event, the frequency of such findings is not material so long as the "plain error" rule is being regularly and consistently applied.

The only category of cases where Campbell purports to identify instances in which Rule 8 has been applied in an inconsistent manner to similar situations is ineffective assistance of counsel cases. He cites a number of cases for the proposition that the Delaware Supreme Court "often invokes Rule 8 to review claims of ineffective assistance of counsel for the first time on direct appeal" and then cites a number of cases for the proposition that it "also frequently exercises its discretion to not consider ineffective assistance of counsel cases for the first time on appeal." Appellant's Br. at 20-21 (emphasis in original). Given the variety of forms ineffective assistance of counsel claims may take and the infinite variety of circumstances in which they may have occurred, this alone hardly demonstrates that Rule 8 is inconsistently applied by the Supreme Court of Delaware in ineffective assistance of counsel cases. Moreover, frequently, when it decides not to consider ineffective assistance of counsel claims for the first time on appeal, the Delaware Supreme Court, as here, does not reach the Rule 8 issue, relying instead on a different and independent rule-such claims are generally best heard in the first instance in a post-conviction relief proceeding because the trial record will not be adequate for resolving the relevant issues, and because trial counsel, if continuing to pursue his representation on direct appeal, should not be required to argue his own ineffectiveness. *Campbell v. State*, 801 A.2d 10, 2002 WL

1472283, *4 (Del. 2002) (citing *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994)). *See also Duross v. State*, 494 A.2d 1265, 1267-69 (Del. 1985); *Collins v. State*, 420 A.2d 170, 177 (Del. 1980). In one of the cases relied upon by Campbell, *Johnson v. State*, 765 A.2d 926, 929 (Del. 2000), for example, the Court concluded that the "plain error" rule gave it the power to hear the ineffective assistance of counsel issue, but that, as here, these kinds of prudential considerations dictated that it stay its hand until the trial court addresses that issue in the first instance. In short, we perceive no inconsistency in the cases Campbell cites.

We hold that Delaware Supreme Court Rule 8 as applied by the Delaware Supreme Court in Campbell's case provides an independent and adequate state ground which forecloses federal *habeas* review as the District Court held.

II. Ineffective Assistance

A.

The state's case against Campbell was straightforward. Two police officers observed Campbell at 1:30 A.M. on December 16, 1999, standing with a woman on the sidewalk. He and the woman had their hands out towards one another and were looking down as they appeared to exchange something. The officers stopped their patrol car near Campbell and got out. As they did, Campbell began to walk away and threw an object into the street under a car. One of the officers retrieved the object almost immediately. It was a bag containing twenty-four smaller bags which held, in total, 2.45 grams of crack cocaine. Campbell was arrested.

The police officers testified at Campbell's trial along with a senior forensic chemist and those having responsibility for the chain of custody of the drugs. Campbell was the sole witness for the

defense. He denied selling drugs. He indicated that he was on his way to visit his aunt and uncle but had some difficulty remembering his uncle's name.

The Supreme Court of Delaware when reviewing the judgment of the Superior Court in the post-conviction relief proceeding described the ineffective assistance of counsel claims before it as follows:

> [H]is trial counsel provided ineffective assistance by failing to conduct an adequate investigation, subpoena trial witnesses, make appropriate objections at trial, conduct a proper cross-examination of the State's witnesses, move to suppress evidence, challenge the arrest warrant, object to improper jury instructions, and move for a mistrial.

Campbell v. State, 830 A.2d 409, 2003 WL 21998563, *1 (Del. 2003). The Delaware Supreme Court denied all of these claims for the same reason:

> In order to prevail on his ineffective assistance of counsel, Campbell must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's professional errors, there is a reasonable probability that the outcome of the proceedings would have been different.[5]
>
> [5] *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

* * *

> Campbell's claims of ineffective assistance of counsel are unavailing. Campbell has presented no evidence that any claimed error on the part of his counsel resulted in prejudice to him.

Id.

Campbell insists that this ruling was an unreasonable application of Strickland because the "Delaware Supreme Court essentially required Mr. Campbell, a pro se litigant, to produce 'evidence' of prejudice at the pleading stage without giving him an opportunity to present evidence of prejudice." Appellant's Br. at 34-35. We disagree.

While it is true that the Court employed the phrase "presented no evidence," we decline to attribute to the Delaware Supreme Court an intent to fault Campbell for not having presented evidence to the Court when no hearing had been held. In context,-that is, in the context of a motion by the state to summarily "affirm the Superior Court's judgment on the ground that it [was] manifest on the face of Campbell's opening brief that the appeal was without merit," App. at 45a,-the Court clearly was ruling that Campbell had provided no reason to believe he could present a prima facie case of prejudice if the matter proceeded to a hearing. This was not an unreasonable application of *Strickland*. We approved a similar application of *Strickland* in *Wells v. Petsock*, 941 F.2d 253, 259 (3d Cir. 1991), where the petitioner, in his petition and brief, had "pointed to no evidence of such prejudice." We affirmed the District Court's dismissal of the *habeas* petition without a hearing. While we there dealt with a District Court's dismissal of a *habeas* petition, our holding makes clear that the Delaware Supreme

Court's application of Strickland was not unreasonable.

> When a district court has denied a petition for a writ of *habeas* corpus without an evidentiary hearing, we must remand for a hearing only if "the petitioner has alleged facts that, if proved, would entitle him to relief." *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 291 (3d. Cir. 1991), petition for *cert.* filed (June 18, 1991). Thus, to merit a hearing, a claim for ineffective assistance of counsel, accepting the veracity of its allegations, must satisfy both prongs of the Strickland test, deficient counsel and prejudice to the defense. *U.S. v. Dawson*, 857 F.2d 923, 928 (3d Cir. 1988). Here, Wells' allegation of ineffective assistance of counsel is impaled on the second prong of the Court's analysis in Strickland.

Wells, 941 F.2d at 259-60.

In order to establish the prejudice required by Strickland, the party claiming ineffective assistance "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693, 104 S.Ct. 2052. While it is true, as Campbell stresses, that his factual allegations had to be accepted for the purpose of determining his entitlement to a hearing, "bald assertions and conclusory allegations do not afford a sufficient ground for

an evidentiary hearing." *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987).

Campbell's brief insists that the Delaware Supreme Court failed to accept his factual allegations regarding prejudice. He fails, however, to identify any such fact. The following segment of his brief before us is typical:

> Accepting Mr. Campbell's *pro se* pleadings and briefs as true, they demonstrate a reasonable probability that his counsel's deficient performance affected the outcome of his case. Mr. Campbell argued that counsel wholly failed to investigate this case. Mr. Campbell argued that counsel failed to subpoena a potentially exonerating witness to determine, at a minimum, what she knew and who she was, and he wholly failed to investigate the evidence against his client.

Appellant's Br. at 36. Campbell fails, however, to allege what this witness would have been able to say that would have been of help to him. As we have previously stressed, "a showing [of Strickland type prejudice] may not be based on mere speculation about what the witnesses [counsel] failed to locate might have said." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989).

This segment of Campbell's brief sets forth only one other claim of "unreasonableness" on the part of the Delaware Supreme Court when it ruled that there was no reason to believe that Campbell had experienced Strickland prejudice from counsel's error. Campbell insists that counsel should have prevented the admission of testimony regarding Campbell's criminal history and that evidence of "prior criminal acts is highly prejudicial." Appellant's Br. at 36.

Campbell does not explain, however, how this alleged error could have had a "reasonable probability" of affecting the outcome of the proceeding. So far as we are able to determine from the record, the jury received only the information that Campbell had been convicted of the felony of receiving stolen property in 1997 and an unspecified "second felony" in 1998. This information would appear to have been admissible under Delaware Rule of Evidence 609 as relevant only to the credibility of Campbell as a witness, and the trial judge so instructed at some length.[7] App. at 149a. This information, accordingly, was appropriately before the jury. Moreover, given the limited information presented to the jury regarding the defendant's record and the overwhelming evidence of his guilt, we cannot say the conclusion reached by the Delaware Supreme Court was an unreasonable application of *Strickland*.

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[7] The Court instructed:

> The fact that the defendant had been convicted of a felony, if such be a fact, may be considered by you for only one purpose; namely, in judging his credibility.
>
> The fact of such a conviction does not necessarily destroy or impair the defendant's credibility, and it does not raise the suggestion that the defendant has testified falsely. It is simply one of the circumstances that you may take into consideration on weighing the testimony of such a witness.
>
> Proof of a prior conviction on the part of the defendant must not and shall not be considered by you in determining the guilt or innocence of the defendant, but may only be considered in judging the defendant's credibility.

App. at 149a.

Campbell has failed to show that the Delaware Supreme Court's application of *Strickland* was unreasonable.

B.

Campbell's federal *habeas* petition consisted of 102 handwritten pages. Since ineffective assistance of counsel claims based on different acts or omissions are discrete claims and must each be exhausted, the District Court began with the difficult task of gleaning from the petition twelve distinct ineffective assistance of counsel claims. Comparing these with the voluminous papers filed in the state post-conviction relief petition, the Court ruled that three of these claims had not been exhausted.[8] The District Court then concluded that Campbell had shown neither "cause and prejudice" nor "miscarriage of justice," *see Coleman*, 501 U.S. at 750, 111 S.Ct. 2546, and denied relief.

Campbell insists that he exhausted all of his claims. He accuses the District Court of mischaracterizing the three claims it held to be unexhausted. Campbell's brief then states those claims as follows:

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[8] The District Court characterized these claims as follows:

> [(1)] counsel failed to investigate whether the female involved in the alleged drug transaction was a police officer, a police informant, or whether she was promised immunity,
>
> [(2)] counsel failed to verify crime scene evidence, and
>
> [(3)] counsel failed to develop overall trial strategy.

Campbell v. Carroll, 2005 WL 2917466 (D. Del. Nov. 4, 2005).

> In his *habeas* petition and brief, Mr. Campbell argued that counsel was ineffective because (1) counsel failed to conduct discovery or investigate into whether the female at the scene was an informant, or a police officer, or offered immunity (R. 188a, 195a, 205a); (2) he failed to request forensic testing of the bag containing cocaine found at the scene (R. 188a, 195a); (3) counsel's overall strategy was to raise reasonable doubt but he failed to pursue that strategy because he did not investigate into the female present at the scene or investigate the evidence against Mr. Campbell (R. 206a).

Appellant's Br. at 29. Campbell insists that each of these claims was not only presented to, but also decided by, the Delaware Supreme Court in the post-conviction relief proceeding.[9]

Liberally construing and then comparing the voluminous pleadings in the state and federal proceedings in this case, *see Montgomery v. Brierley*, 414 F.2d 552, 555 (3d Cir. 1969) (calling for liberal construction of pro se *habeas* petitions), is a difficult task, and it is not surprising that the District Court and Campbell's court-appointed counsel reached somewhat different conclusions after doing so. We find it unnecessary for us to tread that path again and believe nothing constructive would be accomplished by our doing so. Rather, we will accept, *arguendo*, Campbell's insistence that the

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[9] "On appeal from the denial of post-conviction relief, the Delaware Supreme Court ... reviewed Mr. Campbell's ineffective-assistance claims.... As to each of Mr. Campbell's ineffective-assistance claims, the court summarily concluded: ...'Campbell has presented no evidence that any claimed error on the part of counsel resulted in prejudice to him.' " Appellant's Br. at 25-26.

three claims described in his brief before us were presented to and rejected by the Supreme Court of Delaware.

As we have indicated, the Supreme Court of Delaware held that Campbell's petition and brief had provided no reason to believe that any of the alleged deficiencies in counsel's performance had resulted in *Strickland*-type prejudice to him. Accepting his factual allegations as true, the Court concluded that Campbell had failed to show a reasonable probability that, but for counsel's professional errors, the outcome would have been different. The District Court was powerless to overturn such a conclusion unless it was able to say it represented an unreasonable application of *Strickland*. Given the state court record, it could not do so.

Campbell simply did not allege in the state court what information investigation of the female at the scene or forensic testing of the bag would have produced that would have been helpful to him. It necessarily follows that the District Court did not err in denying *habeas* relief.

III. Conclusion

The judgment of the District Court will be affirmed.

Appendix B – District Court's Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Jamar L. Campbell,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ-A No. 03-916-GMS
	)	
Thomas Carroll, Warden,	)	
	)	
Respondent.	)	

Jamar L. Campbell, *pro se* Petitioner.
Thomas E. Brown, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware, Attorney for Respondent.

MEMORANDUM OPINION

November 4, 2005

Wilmington, Delaware

/s/Gregory M. Sleet
Sleet, District Judge

I. INTRODUCTION

Petitioner Jamar L. Campbell is an inmate at the Delaware Correctional Center in Smyrna, Delaware. He has filed the pending petition for a writ of habeas corpus ("petition") pursuant to 28 U.S.C. § 2254. (D.I. 1.) For the reasons that follow, the court will dismiss his petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 1999, a probation and parole officer and a Wilmington police officer were patrolling in downtown Wilmington as part of Operation Safe Streets.[1] It was 1:30 in the morning when they observed Campbell standing with a woman on a sidewalk. Campbell and the woman had their hands extended toward each other and appeared to exchange something. The officers stopped their unmarked patrol car near Campbell and exited the vehicle. Campbell began to walk away and, with his right hand, threw an object into the street under a car. One of the officers retrieved the item, which turned out to be a single bag filled with 24 individual bags of crack cocaine. The total weight of the crack was 2.45 grams. The officers arrested Campbell and charged him with possession with intent to deliver cocaine and possession of cocaine within 300 feet of a park. Campbell v. State, 801 A.2d 10 (Table), 2002 WL 1472283 (Del. Jun. 27, 2002).

During his jury trial in the Delaware Superior Court, Campbell testified that a coworker dropped him off on the street after

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[1] Operation Safe Streets is a joint police and probation program designed to apprehend offenders who fail to comply with the terms of their probation. *See Ayers v. Kearney*, 2005 U.S. Dist. LEXIS 8366, 2005 WL 1106078, at *6 n.3 (D. Del. May 6, 2005).

finishing work in Newark. Campbell said that his house was approximately three blocks away from where he was arrested, and that he was en route to visit his aunt and uncle. He testified that he did not know the woman, and that she had asked him if he had a light for a cigarette. Campbell also denied that he was attempting to sell drugs on the night of his arrest. *Id.*

The jury convicted Campbell of both charges. In August 2001, the Superior Court sentenced Campbell to a total of eighteen years incarceration, to be suspended after serving fifteen years for decreasing levels of supervision. Campbell appealed, and before the Delaware Supreme Court issued a mandate, he filed in the Superior Court a pro se motion for new trial. The Superior Court deferred action on the motion until the Delaware Supreme Court issued its mandate. *Campbell v. State*, 813 A.2d 1140 (Table), 2002 WL 31855335 (Del. Dec. 19, 2002).[reported in full at] 2002 Del. LEXIS 757. After the Delaware Supreme Court affirmed Campbell's convictions and sentences, the Superior Court denied the motion for new trial. *Id.* at * * 1. Campbell appealed, and the Delaware Supreme Court affirmed the Superior Court's decision. *Id. See Campbell v. State*, 813 A.2d 1140 (Table), 2002 WL 31855335 (Del. Dec. 19, 2002).

In September 2003, Campbell filed in this court a 130-page petition for the writ of habeas corpus, essentially raising seven claims for relief. (D.I. 1.) The State filed an answer, asking the court to dismiss the petition because six claims are procedurally barred and one claim does not warrant relief under § 2254(d)(1). (D.I. 15.) Campbell filed a reply disputing the State's argument that six of his claims are procedurally barred. (D.I. 18.)

Campbell's petition is ready for review.

III. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism and Effective Death Penalty Act of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)(internal citations and quotation marks omitted). Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA imposes procedural requirements and standards for analyzing the merits of a habeas petition in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *see Woodford*, 538 U.S. at 206.

B. Exhaustion and Procedural Default

Absent exceptional circumstances, a federal court cannot grant habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-44, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). AEDPA states, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement is based on principles of comity, requiring a petitioner to give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 844-45; *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000). A petitioner satisfies the exhaustion requirement by demonstrating that the habeas claim was "fairly presented" to the state's highest court, either on direct appeal or in a post-conviction proceeding. *See Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)(citations omitted); *Coverdale v. Snyder*, 2000 U.S. Dist. LEXIS 22192, 2000 WL 1897290, at *2 (D. Del. Dec. 22, 2000). "'Fair presentation' of a claim means that the petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'" *Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (citing *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999)).

A petitioner's failure to exhaust state remedies will be excused if state procedural rules preclude him from seeking further relief in state courts. *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000); *Wenger v. Frank*, 266 F.3d 218,

223 (3d Cir. 2001); see *Teague v. Lane*, 489 U.S. 288, 297-98, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Although the failure to exhaust state remedies may be excused, unexhausted claims are still procedurally defaulted. *Lines*, 208 F.3d at 160. Similarly, if a state court refused to consider a petitioner's claims for failing to comply with an independent and adequate state procedural rule, the claims are deemed exhausted but procedurally defaulted. *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); *Werts*, 228 F.3d at 192.

Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claim. *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999); *Coleman v. Thompson*, 501 U.S. 722, 750-51, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Caswell v. Ryan*, 953 F.2d 853, 861-62 (3d Cir. 1992). To demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). A petitioner can demonstrate actual prejudice by showing "not merely that the errors at. . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000); *Wenger v. Frank*, 266

F.3d 218, 224 (3d Cir. 2001). A petitioner demonstrates a miscarriage of justice by showing a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. Actual innocence means factual innocence, not legal insufficiency, *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), and is established if no reasonable juror would have voted to find the petitioner guilty beyond a reasonable doubt. *Sweger v. Chesney*, 294 F.3d 506, 522-24 (3d Cir. 2002).

C. Standard of Review Under AEDPA

If a federal court determines that a claim is not procedurally defaulted and the state court adjudicated the federal claim on the merits, the court can only grant habeas relief if the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). A claim is considered to have been "adjudicated on the merits" for the purposes of 28 U.S.C. § 2254(d)(1) if the state court "decision finally resolv[es] the parties claims, with res judicata effect, [and] is based on the substance of the claim advanced, rather than on a procedural, or other ground." *Rompilla v. Horn*, 355 F.3d

233, 247 (3d Cir. 2004)(internal citations omitted), reversed on other grounds by *Rompilla v. Beard*, -- U.S. --, 125 S.Ct. 2456, 162 L. Ed. 2d 360 (2005).

When reviewing a § 2254 petition, a federal court must presume the state court's determinations of factual issues are correct, unless the petitioner presents clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 341, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (stating that the clear and convincing standard in § 2254(e)(1) applies to factual issues, whereas the unreasonable application standard of § 2254(d)(2) applies to factual decisions). This presumption of correctness applies to both explicit and implicit findings of fact. *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000).

IV. DISCUSSION

Campbell asserts the following seven grounds for relief in his petition: (1) numerous allegations that defense counsel provided ineffective assistance; (2) prosecutorial misconduct, stemming from the prosecutor's prejudicial remarks made throughout the trial; (3) the trial court erred by not curing the effect of the improper prosecutorial statements, by permitting suggestive and perjured testimony to occur, by asking Campbell improper and prejudicial questions, and by disclosing Campbell's past record; (4) the State changed the elements of the charges in the indictment, causing a structural defect in the trial, and therefore violated his rights to due process and a fair trial; (5) the State did not prove the elements of the charged offenses beyond a reasonable doubt, and there was insufficient evidence to sustain his convictions; (6) the evidence at trial had been tampered with; and (7) the jury instructions were improper.

The State concedes that Campbell has exhausted state remedies for these claims.[2] However, it contends that claims two through seven are procedurally barred from federal habeas review due to Campbell's failure to present the claims to the state courts in the correct procedural manner. The State also contends that Campbell's ineffective assistance of counsel allegations do not warrant federal habeas relief under § 2254(d)(1).

A. Claim one: ineffective assistance of counsel

In his petition, Campbell asserts the following allegations regarding his counsel's deficient performance:[3] (1) counsel failed to

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[2] The court notes that the State's answer actually characterizes one of the claims as alleging that "the trial judge's questions to Campbell were improper and prejudicial," and cites D.I. 1 at 8-9, 80-93. (D.I. 15.) However, because a review of those same pages reveals that Campbell is asserting prosecutorial misconduct (claim two), the court characterizes the claim with the terminology used by Campbell. The court has included the claim regarding the trial judge's improper questions in claim three. Further, the record reveals that Campbell presented his prosecutorial misconduct claim to the Delaware Supreme Court on direct appeal. Thus, the prosecutorial misconduct claim is exhausted.

[3] The State summarizes Campbell's exhausted ineffective assistance allegations as follows: (1) failure to conduct an adequate investigation; (2) failure to subpoena trial witnesses; (3) failure to make appropriate objections at trial; (4) failure to conduct a proper cross-examination; (5) failure to seek suppression of evidence; (6) failure to challenge the arrest warrant; (7) failure to object to improper jury instructions; and (8) failure to move for a mistrial. (D.I. 15, at 10.) Although the court has construed Campbell's petition as asserting a total of twelve ineffective assistance allegations, the substance of the nine exhausted claims identified by the court actually mirror the substance of the eight exhausted claims identified by the State; allegations one and ten identified

subpoena the female with whom Campbell was conversing on the night of his arrest; (2) counsel engaged in a line of questioning that supported the State's allegations and opened the door to the admission of Campbell's past acts; (3) counsel failed to object to: Officer Mark Herron's testimony, the admission of the cocaine where Officer Mark Herron could not state with certainty if it was a plastic bag containing cocaine allegedly thrown by Campbell, the State's assertion that a drug transaction was taking place, and the State's assertion that Campbell was caught selling drugs; the jury instructions; (4) counsel failed to file a pre-trial motion to suppress evidence on the basis of Delaware Rule of Evidence 609 and to challenge the probable cause of arrest warrant; (5) counsel failed to investigate certain mitigating evidence about Campbell's character and background; (6) counsel failed to call any witnesses; (7) counsel failed to investigate whether the female involved in the alleged drug transactionwas a police officer, a police informant, or whether she was promised any immunity; (8) counsel failed to move for a mistrial based on prosecutorial misconduct; (9) counsel failed to verify crime scene evidence; (10) counsel failed to hire an investigator to find the female involved in the alleged drug transaction; (11) counsel failed to investigate the lawfulness of the arrest; and (12) counsel failed to develop overall trial strategy. (D.I. I, at 17-60).

1. Allegations one-six, eight, ten, and eleven do not warrant relief under § 2254(d)(1)

The record reveals that Campbell exhausted state remedies for allegations one through six,

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by the court actually allege the same deficiency: failure to investigate.

eight, ten, and eleven because he presented them to the Delaware Supreme Court in his post-conviction appeal. (D.I. 11, Appellant's Br. in Campbell v. State, No. 297, 2003, pp. 5-20.) The Delaware Supreme Court denied these claims as meritless. Therefore, the court must apply the deferential standard provided by § 2254(d)(1) and determine whether Delaware Supreme Court's decision was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.

The "clearly established Federal law" which governs ineffective assistance of counsel claims is the two-pronged standard enunciated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and its progeny. *See Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance actually prejudiced the petitioner's case; in other words, there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88, 692-94; *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). In order to sustain an ineffective assistance of counsel claim, a petitioner must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal. *See Wells v. Petsock*, 941 F.2d 253, 259-260; *Dooley v. Petsock*, 816 F.2d at 891-92. Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable." *Strickland*, 466 U.S. at 689.

Here, the Delaware Supreme Court identified Strickland as the appropriate standard to apply and analyzed Campbell's ineffective assistance claims within its framework. *Campbell*, 2003 Del. Super. LEXIS 228, 2003 WL 21998563, at **1. Consequently, the state supreme court's denial of Campbell's ineffective assistance of counsel claims was not "contrary to" clearly established Federal law. Williams, 529 U.S. at 406 (holding that when a "run-of-the-mill state-court decision applies the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case," the decision is not "contrary to" that precedent).

The court must also determine whether the state court's rejection of Campbell's ineffectiveness claims involved an "unreasonable application of" Strickland. See 28 U.S.C. § 2254(d)(1). "The unreasonable application test is an objective one - a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly." *Jacobs v. Horn*, 395 F.3d 92, 100 (3d Cir. 2005)(citing *Wiggins v. Smith*, 539 U.S. 510, 520-21, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). Rather, a federal habeas court must objectively evaluate the state court decision on the merits and determine whether the state court reasonably applied the correct rule to the specific facts of the petitioner's case. *See Williams*, 529 U.S. at 409, 412-13; *Matteo*, 171 F.3d at 891.

Both the Superior Court and the Delaware Supreme Court denied Campbell's ineffective assistance of counsel claims after finding that Campbell did not establish the requisite prejudice under Strickland. As stated by the *Strickland* Court:

> There is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.

Strickland, 466 U.S. at 697. Thus, the state courts did not unreasonably apply Strickland by only focusing Campbell's inability to establish the requisite prejudice.

The court also concludes that the state courts did not unreasonably apply Strickland in concluding that defense counsel had not provided ineffective assistance. Campbell's habeas petition only outlines the alleged deficiencies with his counsel's performance; he fails to provide any evidence that trial counsel did anything other than reasonably exercise his professional judgment in acting the way he did.

Further, Campbell's habeas petition fails to substantiate his ineffectiveness claims with concrete allegations of prejudice sufficient to satisfy Strickland. For example, Campbell's complaints regarding his counsel's failure to investigate and failure to subpoena witnesses are based upon the fact that the woman present on the night of his arrest did not testify at trial. (D.I. 1, at 17.) However, because the unnamed woman was not taken into custody by police on the night of Campbell's arrest, *Campbell*, 801 A.2d 10, 2002 WL 1472283, at **2, any allegation regarding her potential testimony is purely speculative. Therefore, Campbell cannot demonstrate that he was prejudiced by his counsel's failure to investigate this unnamed woman because he cannot show what a "proper" investigation would have produced and that the

resulting information would have led to a different result. *U.S. v. Askew*, 319 U.S. App. D.C. 2, 88 F.3d 1065, 1073 (C.A.D.C. 1996); *Sullivan v. Fairman*, 819 F.2d 1382, 1392 (7th Cir. 1987).

Similarly, when a petitioner complains about his counsel's failure to procure unspecified testimony, he must set forth facts to support his contention that the testimony would have made a difference in the outcome of his trial. *See Mayberry v. Petsock*, 821 F.2d 179, 187 (3d Cir. 1991). Given the fact that the two arresting officers testified at trial that they saw Campbell throw the crack cocaine into the street, Campbell's vague and conclusory statements fail to demonstrate that "but for" the unnamed woman's speculative testimony, the outcome of his trial would have been different. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991).

Campbell also fails to establish prejudice for the remainder of his ineffective assistance claims, especially when the claims are viewed in light of the simple and straightforward set of facts. Two officers provided eyewitness testimony that they saw Campbell interacting with an unnamed woman at 1:30 in the morning. As they approached him, they saw Campbell discard a bag containing 24 other bags of crack cocaine packaged for distribution. The officers were only a few feet away from Campbell when he threw the bag containing cocaine into the street. The bag landed under a car, and one officer retrieved it almost immediately.

Campbell was the sole witness for the defense. He testified that he did not know the name of the woman to whom he was talking when he was arrested, and he denied that he was selling drugs. He also testified that a coworker dropped him off after work, and that

he was en route to visit his aunt and uncle's house nearby when he was arrested. However, Campbell could not remember his uncle's last name and, even though he was only three blocks from his own house when he was arrested, he did not remember the name of the street where he was dropped off.

The jury's guilty verdict demonstrates that they rejected Campbell's story. Although Campbell challenges this conclusion by alleging ineffective assistance of counsel, he fails to show that his trial result would have been different had his counsel acted otherwise. All of Campbell's actions on the night of his arrest occurred within 240 feet of a park. Thus, there was sufficient evidence to sustain the jury's verdict that Campbell possessed the cocaine within 300 feet of a park. Further, the way in which the cocaine was packaged, the total weight of the cocaine (2.45 grams), and Campbell's hasty attempt to discard it at approximately 1:30 in the morning supported an inference that Campbell intended to "deliver" the cocaine.

Accordingly, Campbell's ineffective assistance of counsel claims do not warrant federal habeas relief under § 2254(d)(1).

2. Allegations seven, nine, and twelve are procedurally barred

Campbell did not exhaust state remedies for ineffective assistance of counsel allegations seven, nine, and twelve because he did not present them to the Delaware Supreme Court in his post-conviction appeal. Any attempt now by Campbell to present these allegations in the Superior Court via a new Rule 61 motion would be time-barred under Rule 61(i)(1) and barred as formerly adjudicated under Rule 61(i)(4). Thus,

state procedural rules foreclose further state court review of these arguments.

The court must excuse Campbell's failure to exhaust state remedies and treat the allegations as exhausted because further state court review is unavailable. Nevertheless, these allegations are still procedurally defaulted. The court cannot review their merits absent a showing of cause for the default and prejudice resulting therefrom, or that a miscarriage of justice will result if the court refrains from reviewing them.

Campbell has not alleged, and the court cannot discern, that any external impediment prevented him from presenting these claims in his state post-conviction appeal. In the absence of cause, the court does not need to address the issue of prejudice. Further, because Campbell does not assert his actual innocence, the miscarriage of justice exception does not apply.

Thus, the court is precluded from reviewing ineffective assistance allegations one through six, eight, and eleven.

B. Claims Two, Three, Four, Five, Six, and Seven are procedurally barred from federal habeas review

The State correctly acknowledges that Campbell exhausted state remedies for claims two through seven because he presented them to the Delaware Supreme Court in his direct appeal.[4] Nevertheless, the State contends that

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[4] Campbell also presented the substance of claims six and seven to the Delaware Supreme Court when he appealed the Superior Court's denial of his motion for new trial. The Delaware Supreme Court affirmed the Superior Court's denial of these claims as time-barred by Delaware Superior Court Criminal Rule 33. The State contends that this denial under Rule 33 also constitutes an independent and adequate state procedural ground precluding federal habeas review of these claims. The court need not address

federal habeas review is unavailable because the Delaware Supreme Court rejected the claims pursuant to Delaware Supreme Court Rule 8, which constitutes an independent and adequate state procedural ground precluding federal habeas review. Campbell filed a traverse disputing the fact that these claims are procedurally barred. Specifically, he argues that the Delaware Supreme Court's review for "plain error" under Delaware Supreme Court Rule 8 constitutes an adjudication on the merits for the purposes of § 2254(d)(1). (D.I. 18.)

Campbell's argument fails. Delaware Supreme Court Rule 8 provides that "only questions fairly presented to the trial court may be presented for review." By basing its rejection of Campbell's claims on Rule 8, the Delaware Supreme Court was making a plain statement that its decision rested on state law grounds. *Harris v. Reed*, 489 U.S. 255, 263-65, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); *see Ylst v. Nunnemaker*, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). This court has consistently held that Delaware Supreme Court Rule 8 is an independent and adequate state ground precluding federal habeas review. *See Hubbard v. Carroll*, 2003 U.S. Dist. LEXIS 1881, 2003 WL 277252, at *3 (D. Del. Feb. 5, 2003); *Maxion v. Snyder*, 2001 U.S. Dist. LEXIS 10764, 2001 WL 848601, at *10 (D. Del. July 27, 2001); *Lawrie v. Snyder*, 9 F. Supp. 2d 428, 452-53 (D. Del. 1998). Consequently, the court cannot review these claims unless Campbell establishes cause for his procedural default and actual prejudice resulting therefrom, or that a miscarriage of justice will

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this issue, however, given the fact that these two claims were presented to the Delaware Supreme Court in Campbell's direct appeal, and therefore, they are procedurally barred for the reasons explained in the text of this opinion.

result in the absence of such review. See 28 U.S.C. § 2254(a); *Coleman v. Thompson*, 501 U.S. 722, 750-51, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Caswell v. Ryan*, 953 F.2d 853, 860-61 (3d Cir. 1992).

Campbell's traverse fails to identify any external factor that impeded his counsel's ability to present these issues to the Superior Court. To the extent Campbell attempts to blame this procedural default on his counsel's alleged ineffective assistance, it fails. Ineffective assistance of counsel can only constitute cause for a procedural default if the attorney's assistance was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). As previously explained, Campbell has failed to demonstrate that his counsel provided ineffective assistance. Therefore, any alleged failure on his counsel's part in preserving these claims for review in the state courts does not excuse Campbell's procedural default.

To the extent Campbell's failure to preserve these claims for state court review was due to his own erroneous understanding of Delaware's procedural rules, this mistake also does not constitute cause for his procedural default. See *Cristin v. Brennan*, 281 F.3d 404, 420 (3d Cir. 2002)("Generally, 'cause' cannot be based on the mere inadvertence of the petitioner or petitioner's counsel to take an appeal").

Campbell's failure to establish cause eliminates the court's need to reach the question of prejudice. *See Smith v. Murray*, 477 U.S. 527, 533, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). Finally, Campbell does not allege that he is actually innocent, nor does he present any colorable evidence of his actual innocence. Thus, Campbell has not demonstrated that a

fundamental miscarriage of justice will result from the court's inability to review this claim.

Accordingly, the court will dismiss claims two, three, four, five, six, and seven as procedurally barred from federal habeas review.

V. CERTIFICATE OF APPEALABILITY

When a district court issues a final order denying a § 2254 petition, the court must also decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Further, when a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the prisoner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Slack, 529 U.S. at 484.

The court concludes that Campbell's petition does not warrant federal habeas relief. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, the court declines to issue a certificate of appealability.

VI. CONCLUSION

For the reasons stated, Campbell's petition for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Jamar L. Campbell,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ-A No. 03-916-GMS
	)	
Thomas Carroll, Warden,	)	
	)	
Respondent.	)	

ORDER

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Jamar L. Campbell's petition for the writ of *habeas* corpus, filed pursuant to 28 U.S.C § 2254, is DISMISSED, and the relief requested therein is DENIED. (D.I. I.)

2. The court declines to issue a certificate of appealability.

Dated: November 4, 2005 /s/Gregory M. Sleet
UNITED STATES
DISTRICT JUDGE

Appendix C – Delaware Supreme Court Opinion on Direct Appeal

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAR CAMPBELL,	§	
	§	
Defendant Below-Appellant,	§	No. 388, 2001
	§	
v.	§	Court Below-
	§	Superior Court of
STATE OF	§	the State of
DELAWARE,	§	Delaware in and for
	§	New Castle County
Plaintiff Below-Appellee.	§	Cr.A. Nos. IN99-12-1779
	§	IN99-12-1780

Submitted: May 7, 2002
Decided: June 27, 2002

Before VEASEY, Chief Justice, WALSH and HOLLAND, Justices

ORDER

This 27th day of June 2002, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Jamar Campbell, was found guilty by a Superior Court jury of Possession with Intent to Deliver Cocaine and Possession of Cocaine Within 300 Feet of a Park. He was later sentenced, for the first

conviction, to a minimum mandatory sentence of 15 years incarceration at Level V[1] and, for the second conviction, to 3 years incarceration at Level V, to be suspended for decreasing levels of probation.

This is Campbell's direct appeal.

(2) Campbell's trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[2]

(3) Campbell's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Campbell's counsel informed Campbell of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Campbell was also informed of his right to supplement his attorney's presentation. Campbell responded with a brief that raises

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[1] Campbell received this minimum mandatory term because he previously had been convicted of the same charge. DEL. CODE ANN. tit. 16, §§ 4751, 4763 (1995).

[2] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

several issues for this Court's consideration.[3] The State has responded to the position taken by Campbell's counsel as well as the issues raised by Campbell and has moved to affirm the Superior Court's judgment.

(4) Campbell raises nine separate issues for this Court's consideration, which may fairly be summarized as follows: a) his counsel provided ineffective assistance; b) the judge's questions to him were improper and prejudicial; c) the judge improperly permitted suggestive, perjured and hearsay testimony by the law enforcement witnesses; d) his arrest was illegal because the date of the crime contained on the indictment was incorrect; e) the physical evidence presented at trial had been tampered with; f) there was insufficient proof of the charges against him and g) the jury instructions were improper.

(5) At trial, Mark Herron, an officer with Probation and Parole, testified for the State. Herron stated that he had worked for Probation and Parole approximately 13 years. His job at the time of Campbell's arrest was to target repeat drug offenders in high-crime areas as part of Operation Safe Streets. On December 16, 1999, at about 1:30 a.m., he was on duty with his partner, Officer Douglas Baylor of the Wilmington Police Department. They were working with other members of the Operation Safe Streets team in a high-crime area located around 24th and Carter Streets in Wilmington, Delaware. Herron and Baylor were together in an unmarked police car as were Marty Lenhardt

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[3] In a letter filed in this Court on March 25, 2002, Campbell asserted that he had not been contacted by his attorney with respect to the appeal. Although Campbell originally provided no points for this Court to consider in connection with his attorney's Rule 26(c) brief filed on March 11, 2002, he was permitted additional time to provide such points.

of Probation and Parole and Officer Brian Witte of the Wilmington Police Department.

(6) While riding in the area with Baylor at the wheel, Herron saw an individual later identified as Campbell standing with a woman on the sidewalk. They were holding their hands out toward each other and were looking down. They appeared to be "exchanging something." Officer Baylor said "[L]et's stop them." Baylor stopped the car and he and Herron got out. As they did so, Campbell, who was about 3 feet away, began walking away from them, eastbound on 24th Street. Herron then saw Campbell toss an object into the street with his right hand. The object landed behind the right front wheel of a parked car. As Lenhardt and Witte arrived at the scene, parked their car and approached Campbell, Herron retrieved the object, which turned out to be a plastic bag containing a number of smaller plastic bags each of which contained a white, chunky substance. After giving the bag to Baylor, Herron and Baylor took Campbell into custody. The woman Campbell was seen with was not taken into custody.

(7) Officer Brian Witte also testified for the State. He stated that he had worked for the Wilmington Police Department for 6 years and was assigned to Operation Safe Streets. On December 16, 1999 at about 1:30 a.m., he was driving an unmarked police car in the area of 24th and Carter Streets with Marty Lenhardt in the passenger's seat. They received a call from Herron and Baylor asking them to stop a man walking eastbound on 24th Street. As they arrived on the scene, Witte spotted Campbell, exited his vehicle and stopped him. Herron told Witte that Campbell had "dumped something" and he had to go back to retrieve it. Witte then saw Herron go to a parked car about 10 feet

away and retrieve something from beneath it. Witte testified that the area where this occurred was about 240 feet from Price Run Park. He estimated the distance by walking between the area and the park and counting his steps. On cross examination, Witte confirmed that his report did not mention an exchange between a woman and Campbell and that he himself had not observed Campbell throw anything into the street. He further stated that he searched Campbell and found two fifty-dollar bills, two ten-dollar bills and one five-dollar bill, but no weapons or drug paraphernalia.

(8) The next witness for the State was Officer Douglas Baylor. He stated that he had worked for the Wilmington Police Department for 15 years and that his current assignment was with Operation Safe Streets. While driving an unmarked police car on December 16, 1999 at approximately 1:30 a.m. he observed two individuals near the corner of 24th and Carter Streets in the City of Wilmington. They were holding their hands out and looking down, indicating to Baylor that they were involved in a drug transaction. He pulled his car past the two individuals and stopped, and he and Herron got out. The man, later identified as Campbell, looked in their direction and began walking away from the woman, eastbound on 24th Street. Baylor did not see Campbell throw anything into the street. Baylor stopped the woman, checked her for weapons and any outstanding warrants, and then released her. After Baylor arrived at the police station, he signed the plastic bag and the money into the evidence locker in the Records Division.

(9) Officer Thomas Dempsey testified next for the State. He stated that he had worked as an Assistant Narcotics Control Officer for the City of Wilmington Police Department's Drug,

Organized Crime and Vice Unit for about 7 years and that his principal duty is chain-of-custody documentation. Specifically, his job is to collect drug envelopes from the drug locker, document them on the computer, and monitor their removal from the locker and their return to the locker. Dempsey testified to the general chain-of-custody procedures used at the police station and testified specifically about how the plastic bag in this case was handled. When it was brought to the police station it was placed in a drug-secure envelope containing information about the defendant and the investigating officer and an identification number. Whenever the envelope was removed from the locker for transmittal to the Medical Examiner or to court, the dates and times were noted, along with the initials of the individual responsible for the removal. The bag was opened only when the Medical Examiner tested the substance inside and subsequently was re-sealed with tape.

(10) The next witness for the State was Dr. Kochu Madhavan, a senior forensic chemist at the Medical Examiner's Office. He testified that he had held that position for more than 25 years. He stated that an envelope with the plastic bag inside was brought to the Medical Examiner's Office from the police department by a police officer and received by an evidence specialist. A number was assigned to the envelope, which was placed in the evidence vault until it was opened for testing. After the envelope and plastic bag were opened and the testing was complete, the plastic bag was re-sealed with tape, re-inserted in the envelope and placed back in the evidence vault until a police officer came to retrieve it. Madhavan testified that he tested the white, chunky substance in the smaller plastic bags and determined that it was crack cocaine, with a total weight of 2.45 grams.

(11) The final witness for the State was Detective Michael Rodriguez of the City of Wilmington Police Department's Drug, Organized Crime and Vice Unit. Rodriguez testified that he had worked as an undercover officer in that unit for about 6 years. He further testified to his specialized training in the investigation of drug cases. Rodriguez was qualified as an expert in the field of drug investigation without objection by the defense. He testified that the area around 24th and Carter Streets in the City of Wilmington is known for drug activity. He further testified that the amount of crack cocaine recovered in this case, the way it was packaged and the amount of money found on Campbell was consistent with the delivery, rather than the mere possession, of drugs.

(12) Campbell testified as the sole defense witness. He stated that he had been dropped off in Wilmington by a co-worker after they had finished work in Newark and was on his way to his aunt and uncle's house near 24th and Carter Streets at the time of his arrest. His own house, where he had lived for over 2 years, was 3 blocks away. Campbell testified that he did not know the woman he was seen talking to. He was walking down the street, she asked him for a light, which he did not have, and he continued walking. On cross examination, Campbell stated that his co-worker did not like the neighborhood and, therefore, had dropped him off a couple of blocks away from his house. He could not remember the name of the street where he was dropped off and had trouble recalling his uncle's last name.

(13) Towards the end of his testimony, Campbell stated that he was "never selling drugs." The attorneys then approached the bench for a sidebar conference as to whether

that statement would allow the prosecutor to bring up Campbell's previous conviction for possession with intent to deliver cocaine. Before beginning the sidebar conference, the judge said to Campbell, " Let me ask a clarification question. You were never selling drugs that evening?" to which Campbell replied, "Not at all." The judge then asked, "Ever?" to which Campbell replied, "No. No. I didn't sell no drugs. I had no drugs. None of that." After deciding that he would not pursue Campbell's previous conviction in cross examination, the prosecutor asked Campbell, "So on the night in question, you did not walk away from the police after they caught you selling drugs; is that your testimony?" to which Campbell replied, "Uh-uh. I didn't walk away from the police." As his final question, the prosecutor asked, "Okay. And they had not caught you about to sell drugs?" to which Campbell replied, "Uh-uh. No."

(14) Campbell's first claim is that his trial counsel provided ineffective assistance. This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.[4] Accordingly, we will not consider Campbell's claim of ineffective assistance for the first time in this direct appeal.

(15) Campbell's next claim is that the judge's questions to him were improper and prejudicial.[5] 5 We have reviewed carefully the transcript of Campbell's trial, including the judge's questions,

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[4] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

[5] We review this claim, as well as the rest of Campbell's claims, for plain error, since he raises them for the first time in this appeal. SUPR. CT. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Plain error is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.*

and conclude that this claim is meritless. The judge asked the questions only to clarify possible confusion. [6]6 Even if the questions did not succeed in clarifying the situation, there was no prejudice to Campbell and no plain error.

(16) Campbell's claim that the judge improperly permitted improperly suggestive, perjured testimony is also meritless. Our review of the trial transcript reveals no impropriety in the witnesses' testimony and no basis whatsoever for a claim of perjury. Campbell complains that Witte's testimony that Herron told him Campbell "dumped something" was inadmissible hearsay and should have been excluded. Even if the testimony was hearsay, its admission was harmless and caused no prejudice, since, as Herron had testified previously, he personally saw Campbell throw something into the street.

(17) There is no merit to Campbell's claim that his arrest was illegal because the date of the crime contained on the indictment was incorrect.[7] The Superior Court is permitted to amend an indictment at any time prior to verdict as long as "no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[8]8 In this case, the Superior Court was clearly within its discretion to permit the amendment of the indictment and, as such, there is no support for Campbell's claim.

(18) There is absolutely no basis for Campbell's next claim that the physical evidence had been tampered with. Our review of the trial

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[6] *Saunders v. State*, 401 A.2d 629, 632-33 (Del. 1979)

[7] Before trial, the State was permitted, without objection from the defense, to amend the indictment to indicate that the crime was committed on December 16, 1999 rather than December 15, 1999.

[8] Super Ct. Crim. R. 7(e)

transcript reveals no impropriety in the way the evidence was handled and no basis upon which to challenge the chain of custody.[9]

(19) Campbell claims that there was insufficient evidence upon which to base his convictions. When a defendant claims that the evidence against him was insufficient to support a jury verdict, the proper standard of appellate review requires this Court to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the [prosecution], could have found the essential elements of the charged offense beyond a reasonable doubt."[10] In this case, Campbell was charged with Possession with Intent to Distribute Cocaine[11] and Possession of Cocaine Within 300 Feet of a Park.[12] Our review of the trial transcript in this case reveals that a reasonable juror clearly could have found the essential elements of these charged offenses beyond a reasonable doubt by relying on the testimony of the State's witnesses. To the extent Campbell complains there was insufficient proof that he "possessed" the drugs, the jury accepted Herron's testimony that he witnessed Campbell throw something into the street, which he subsequently retrieved and gave to Baylor, and which ultimately was revealed to be crack cocaine. The element of "possession" of cocaine was, thus, clearly established[13] and there was no plain error.

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[9] *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987).

[10] *Morrisey v. State*, 620 A.2d 207, 213 (Del. 1993).

[11] DEL. CODE ANN. tit. 16, §§ 4716(b) (4) and 4751 (1995).

[12] DEL. CODE ANN. tit. 16, § 4768 (1995).

[13] DEL. CODE ANN. tit. 16, § 4701(30) (1995).

(20) Campbell's final claim is that the jury instructions were improper. Specifically, he argues that the word "constructive" should have been removed from the jury instruction on delivery based on a pre-trial agreement between counsel. A trial court's jury instruction can be a basis for reversal if the deficiency had the effect of undermining the ability of the jury to perform its duty to return a verdict.[14] We have reviewed the jury instruction on delivery and conclude that the Superior Court did not err in giving that instruction.[15] Even assuming that the use of the word "constructive" was contrary to counsel's prior agreement, the ability of the jury to perform its function was not undermined and there was no plain error.

(21) This Court has reviewed the record carefully and has concluded that Campbell's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Campbell's counsel has made a conscientious effort to examine the record and has properly determined that Campbell could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:
s/Joseph T. Walsh
Justice

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[14] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

[15] DEL. CODE ANN. tit. 16, § 4701(8) (1995).

Appendix D – Delaware Supreme Court Opinion on Appeal from Denial of Post-conviction Relief

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAR CAMPBELL,	§	
	§	
Defendant Below-Appellant,	§	No. 388, 2001
	§	
v.	§	Court Below-Superior Court of
	§	the State of
STATE OF DELAWARE,	§	Delaware in and for
	§	New Castle County
Plaintiff Below-Appellee.	§	Cr.A. Nos. IN99-12-1779
	§	IN99-12-1780

Submitted: July 3, 2003
Decided: August 21, 2003

Before HOLLAND, STEELE and JACOBS, Justices

ORDER

This 21st day of August 2003, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Jamar L. Campbell, filed an appeal from the Superior Court's May 30, 2003 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The State of Delaware

has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of Campbell's opening brief that the appeal is without merit. We agree and AFFIRM.

(2) In March 2001, a Superior Court jury found Campbell guilty of Possession With Intent to Deliver Cocaine and Possession of Cocaine Within 300 Feet of a Park. Campbell was sentenced to a total of 18 years incarceration at Level V, to be suspended after 15 years for decreasing levels of probation. Campbell filed a direct appeal of the Superior Court's judgment, which was affirmed by this Court.[1]

(3) In this appeal, Campbell claims that: a) the prosecutor made improper remarks at trial that were prejudicial to his case; b) the amendment to his indictment was prejudicial and deprived him of a fair trial; c) evidence of his criminal history was improperly admitted into evidence; d) there was insufficient evidence presented at trial to prove the State's case; and e) his trial counsel provided ineffective assistance by failing to conduct an adequate investigation, subpoena trial witnesses, make appropriate objections at trial, conduct a proper cross-examination of the State's witnesses, move to suppress evidence, challenge the arrest warrant, object to improper jury instructions, and move for a mistrial.

(4) Campbell's first four claims are procedurally barred either because they were not raised on direct appeal and there is no evidence of cause or prejudice,[2] or because they were previously adjudicated in his direct appeal and there is no evidence that reconsideration of the

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[1] *Campbell v. State*, Del. Supr., No. 388, 2001, Walsh, J. (June 27, 2002).

[2] SUPER. CT. CRIM. R. 61(i)(3).

claims is warranted in the interest of justice.[3] There is, moreover, no evidence of a miscarriage of justice occasioned by a constitutional violation that undermined the fundamental legality, integrity or fairness of the proceedings leading to the judgment of conviction.[4]

(5) In order to prevail on his claim of ineffective assistance of counsel, Campbell must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's professional errors, there is a reasonable probability that the outcome of the proceedings would have been different.[5] Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."[6]

(6) Campbell's claims of ineffective assistance of counsel are unavailing. Campbell has presented no evidence that any claimed error on the part of his counsel resulted in prejudice to him.

(7) It is manifest on the face of Campbell's opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED.

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[3] Super. Ct. Crim. R. 61(i) (4).

[4] SUPER. CT. CRIM. R. 61(i) (5).

[5] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

[6] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

The judgment of the Superior Court is AFFIRMED.[7]

BY THE COURT:
/s/ Myron T. Steele
Justice

[7] After the State filed its motion to affirm, Campbell filed a motion for leave to respond in which he argues that the State's motion to affirm "mischaracterizes" his claims. We have reviewed Campbell's motion and it neither supports that argument nor presents any matter that is different from what is contained in his opening brief. For these reasons, Campbell's motion for leave to respond is denied.

Appendix E – 28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to

raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

Appendix F - Delaware Supreme Court Rule 8

Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

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(2)

No. 07-1415

Supreme Court, U.S.
FILED
AUG 20 2008
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In The
Supreme Court of the United States

JAMAR CAMPBELL,

Petitioner,

v.

PERRY PHELPS, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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Respondent, Perry Phelps, Warden of the Vaughn Correctional Center, respectfully asks this Court to deny the petition seeking review of the February 14, 2008 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals is officially published in the Federal Reporter at 515 F.3d 172 and is reproduced at Pet. App. 1a-26a. The decision of the United States District Court for the District of Delaware is not officially reported but is available at 2005 WL 2917466 and is reproduced at Pet. App. 27a-45a. The order of the Delaware Supreme Court in petitioner's case, affirming his convictions on direct appeal, is not officially reported but is available at 2002 WL 1472283 and is reproduced at Pet. App. 47a-57a.

JURISDICTION

The judgment of the court of appeals was entered February 14, 2008. The petition for a writ of certiorari was filed May 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner was convicted in 2001 of two drug offenses. After unsuccessfully seeking state post-conviction relief, petitioner applied for federal habeas relief in September 2003. The district court denied the petition, rejecting the seven claims for relief advanced by petitioner. On appeal, the court of appeals affirmed.

1. In the early morning hours of December 16, 1999, a city police officer and a state probation officer, in an unmarked patrol car, saw petitioner engaged in what appeared to be a drug transaction near the corner of 24th and Carter Streets in Wilmington, Delaware. Petitioner and a woman were extending a hand to each other and seemed to be exchanging some items. The officers stopped the patrol car near the two. As the officers got out of the car, petitioner began walking away, and the probation officer saw petitioner toss an object into the street where it landed behind the front wheel of a parked car. At this point, another patrol car arrived on the scene and the officers in that car stopped petitioner. The probation officer who had seen petitioner discard the object then retrieved the item from the street; it was a plastic bag containing a number of smaller plastic bags, each of which contained a white chunky substance. Petitioner was arrested and charged with possession of cocaine with intent to deliver and possession of cocaine within 300 feet of a park. Subsequent testing by the state Medical Examiner determined that the chunky

substance was crack cocaine, with a total weight of 2.45 grams. Pet. App. 18a, 49a-51a.

At trial, petitioner denied selling drugs the night of his arrest. As he described events, after finishing work that night, he had been dropped off in the area by a co-worker. When officers saw him, he had been going to the house of his aunt and uncle, and his own house was only three blocks away. According to petitioner, he did not know the woman with whom officers had seen him; as he walked down the street, the woman approached him and asked for a light. Not having one, he had simply continued walking. On cross-examination, petitioner explained that his co-worker had dropped him off a few blocks from his house because his co-worker did not like the neighborhood, though he could not recall where he and his co-worker had parted. Petitioner also had difficulty remembering his uncle's surname. The jury convicted petitioner of the two charged drug offenses. Pet. App. 53a.

On direct appeal, defense counsel moved to withdraw from the case, and as allowed by state appellate procedure, petitioner advanced nine separate issues for consideration by the state supreme court.[1] Petitioner's contention that trial counsel had provided ineffective assistance was summarily rejected, claims

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[1] Pet. App. 47a-49a. *See generally* Del. Supr. Ct. R. 26(c) (setting out procedure for appellate counsel to withdraw from case under *Anders v. California*, 386 U.S. 738 (1967)).

of ineffective assistance, under state law, to instead only be considered in state post-conviction proceedings. Pet. App. 54a. *See* Pet. App. 17a ("when it decides not to consider ineffective assistance of counsel claims for the first time on appeal, the Delaware Supreme Court . . . rel[ies] on a different and independent rule – such claims are generally best heard in the first instance in a post-conviction relief proceeding. . . ."). Petitioner's other claims of error, all of which involved the trial proceedings, also had not been raised at trial. Thus, the state supreme court reviewed those claims under Delaware Supreme Court Rule 8, the state plain error rule. Pet. App. 54a ("We review this claim, as well as the rest of [petitioner]'s claims, for plain error, since he raises them for the first time in this appeal."). *See* Pet. App. 66a (reproducing text of rule). Concluding that there was no plain error, the court affirmed petitioner's convictions. Pet. App. 54a-57a. Petitioner subsequently applied for state post-conviction relief, contending *inter alia* that trial counsel had provided ineffective assistance. The state courts denied the motion. Pet. App. 58a-61a.

2. The district court denied petitioner's application for federal habeas relief. Petitioner contended that trial counsel had been ineffective, but the district court held that the state courts had reasonably applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) in denying relief. Pet. App.

36a-41a.[2] In turn, petitioner's claims of trial error could not be considered because he had procedurally defaulted those claims by presenting them for the first time on direct appeal, having failed to first raise the issues at trial. The district court concluded that the state supreme court, "by basing its rejection of [petitioner's] claims on Rule 8 was making a plain statement that its decision rested on state law grounds." Pet. App. 43a (citing cases). Applying district precedent, the district court then held that Rule 8 was "an independent and adequate state ground precluding federal habeas review." Pet. App. 43a (citing cases). Petitioner had not established cause for the default, and he had not made any showing of actual innocence that would justify review of the claims despite his default. Pet. App. 43a-45a.

3. The court of appeals affirmed. Pet. App. 1a-26a. Delaware Supreme Court Rule 8 constituted an independent and adequate state law ground that was sufficient to preclude federal habeas review of petitioner's claims of trial error. In the first instance, the state supreme court had "expressly invoked Rule 8 in the disposition" of those claims, holding "that all . . . of [those] claims failed to pass the 'plain error' test." Pet. App. 4a. The court of appeals rejected petitioner's

---

[2] The district court also determined that petitioner had procedurally defaulted three allegations of ineffective assistance because he had not presented the particular contentions to the state supreme court in his post-conviction appeal. Pet. App. 41a-42a.

contention that the state supreme court had "'actually reviewed' the merits of his federal claims. . . ." Pet. App. 6a. The state court had made "a 'plain statement' that Rule 8 applied to each of those claims and then proceeded to examine each under the standards applicable to Rule 8's 'interests of justice' exception. The [state supreme court] concluded that each claim, in turn, did not involve 'plain error.'" Pet. App. 7a. That the state court had written that "[petitioner]'s appeal [was] 'wholly without merit'" did not "detract from the independence of the 'no plain error' ruling on each of [petitioner]'s claims." Instead, when the state supreme court conducts plain error review, the court

> is applying state, not federal, law and it can apply that state law without resolving the merits of the federal constitutional issue. Delaware case law establishes that the issue of whether the alleged error in the context of this particular case "was apparent on the face of the record" and "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process" are issues governed by Delaware law. And those issues may be resolved by assuming *arguendo* the merit of the federal claim.

Pet. App. 7a-8a. Invocation of plain error review "in order to mitigate the effect of a state procedural default rule [did not] deprive a state court ruling of its 'independent' character," and the reading of Rule 8 in petitioner's case was consistent with the result

reached by several other federal courts of appeals. Pet. App. 9a-11a.[3]

REASONS FOR DECLINING REVIEW

1. Most of the States "recognize the authority of an appellate court to reverse on the basis of a plain error even though that error was not properly raised and preserved at the trial level." 7 Wayne R. LaFave, *et al.*, CRIMINAL PROCEDURE 87-88 (3d ed. 2007). As presented by petitioner, the decision below "is in direct conflict with decisions of" five other courts of appeals and the courts of appeals are divided on the issue. Pet. 6-15. The conflict, however, is not as clear as petitioner would have it.

a. The merits of a federal claim that was procedurally defaulted by the prisoner in the state courts can not be considered on federal habeas review if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The state court's decision is not independent if the resolution of

[3] The court of appeals also rejected petitioner's argument that Rule 8 was not "adequate" to preclude federal habeas review. Pet. App. 12a-18a. In addition, the court decided that the application of *Strickland* by the state supreme court in rejecting petitioner's claims of ineffective assistance was reasonable. Pet. App. 18a-26a. Petitioner does not challenge these determinations by the court of appeals.

the state procedural question depends "on an antecedent ruling of federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Unless a state court's decision "fairly appears" to rest primarily upon federal law, a federal court should not assume that the state judgment failed to rely exclusively on its own sovereign principles. *Coleman*, 501 U.S. at 737 ("In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds.").

b. Plain error review generally entails two inquiries: did an error actually occur in the trial and did the error affect the outcome of the trial. *See generally United States v. Olano*, 507 U.S. 725, 732-33, 734 (1993); *United States v. Young*, 470 U.S. 1, 16 n.14 (1985). A state court, conducting plain error review, thus may decide that the particular claim lacks merit under federal law and that there is, perforce, no plain error. The resolution of the state procedural law question in that situation has turned on a federal constitutional ruling, and the state procedural law decision is thus not independent. But a state court can also assume, without deciding, that an error occurred, but that any error did not affect the outcome of the trial. The resolution of the state procedural law question then has nothing to do with the federal claim advanced by the prisoner, and the

state law decision is accordingly independent. *Cargle v. Mullin*, 317 F.3d 1196, 1205-06 (10th Cir. 2003).

c. Because deciding whether plain error review by a state appellate court is "independent" of federal law turns on the nature of the state rule, the conflict identified by petitioner (and the court of appeals) is better explained by the varying scope of plain error review among the states (or the particular scope of the plain error analysis by the state court), not by the existence of an irreconcilable split among the courts of appeals. *See Willis v. Aiken*, 8 F.3d 556, 565 (7th Cir. 1993), *cert. denied*, 511 U.S. 1005 (1994). Thus, for example, in *Daniels v. Lee*, 316 F.3d 477 (4th Cir.), *cert. denied*, 540 U.S. 851 (2003), the prisoner had not objected to alleged errors in the prosecutor's closing argument, and the state supreme court on direct appeal only considered whether the prosecutor's comments had affected the outcome of the trial. 316 F.3d at 487. Similarly, in *Gunter v. Maloney*, 291 F.3d 74 (1st Cir. 2002), the prisoner had failed to raise at trial an argument that the claim that the felony murder charge merged with the underlying felony of assault against the same victim. But according to the state supreme court, there was no miscarriage of justice because even if the indictment and instructions had specified the correct theory, the prisoner would have been convicted anyway. 291 F.3d at 78-80. In *Gutierrez v. Moriarty*, 922 F.2d 1464 (10th Cir.), *cert. denied*, 502 U.S. 844 (1991), the state courts held the prisoner's speedy trial claim to be forfeited, the prisoner having presented insufficient proof on the

issue. 922 F.2d at 1468. In each of these cases, because the decision of the respective state courts did not turn on a resolution of federal law, the state law ruling was independent of federal law. *See, e.g., Willis,* 8 F.3d at 565-66 (Indiana law); *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir.), *cert. denied*, 488 U.S. 960 (1988) (noting state court wrote that there were no "prejudicial errors.") (Alabama law).

In contrast, the state appeals court in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005), *cert. denied*, 547 U.S. 1022 (2006), had concluded that the prisoner's failure to object to his persistent offender sentence on *Apprendi*[4] grounds barred consideration of the claim on appeal, but the court reached that conclusion based on its resolution of the *Apprendi* claim. 409 F.3d at 529. Similarly, in *Roy v. Coxon*, 907 F.2d 385 (2d Cir. 1990), the state supreme court held that the prisoner's challenge to the jury instructions was forfeited, but in coming to that result, the state court had expressly relied on decisions of this Court. 907 F.2d at 388. In these cases, the court of appeals concluded that because the resolution of the state procedural law question turned on a federal constitutional ruling, the state procedural law decision was not independent. *See, e.g., Spears v. Mullin*, 343 F.3d 1215, 1236 n.21 (10th Cir. 2003) (Oklahoma law). That some of the courts of appeals have written that the lower federal courts appear to be divided on the

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[4] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

issue, *e.g.*, *Cargle*, 317 F.3d at 1205 & n.7, is not germane: "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). In short, the conflict posited by petitioner is not as obvious as he suggests, and further review of the issue is not warranted.

2. Petitioner contends that the court of appeals was wrong in its construction of Rule 8. As he sees it, the state supreme court in his case did not "explicitly state[] that Rule 8 procedurally barred [his] claims." Pet. 16. In turn, he reads Rule 8 to only reach constitutional claims; from that, he urges that when the Delaware Supreme Court holds that there is no plain error, that determination rests on an antecedent ruling of federal law. Thus, when the state supreme court decides that there is no plain error, that ruling, in petitioner's view, is not independent of federal law. Pet. 16.

a. This Court ordinarily "accept[s], and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). The general presumption that courts of appeals correctly decide questions of state law reflects a judgment that the lower federal courts are better suited to the task of deciding questions of state procedural law, because those courts "are more familiar than [this Court] with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518,

525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980); *County Court of Ulster County v. Allen*, 442 U.S. 140, 153-54 (1979)); *see id.* at 547 (O'Connor, J., dissenting). *See, e.g., Selvage v. Collins*, 494 U.S. 108, 110 (1990) ("the Court of Appeals for the Fifth Circuit is more familiar with Texas law than we are, and we therefore . . . remand the case to it for determination whether petitioner's *Penry* claim is presently procedurally barred under Texas law."); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) ("This Court's resolution of such a state-law question [of procedural default] would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law."). *See generally* Catherine T. Struve, DIRECT AND COLLATERAL FEDERAL COURT REVIEW OF THE ADEQUACY OF STATE PROCEDURAL RULES, 103 Colum. L. Rev. 243, 283-301 (2003). There is no occasion to set aside the construction by the court of appeals of Rule 8. Petitioner has offered no reason for the Court to depart from its normal practice of deferring to decisions of the lower federal courts involving questions of state procedure. Moreover, the Court does not disturb a court of appeals' construction of state law unless it is unreasonable or plainly wrong. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 345-46 & n.10 (1976) (collecting cases); *United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959). The court of appeals' decision here is neither.

b. As explained by the Court in *Harris v. Reed*, 489 U.S. 255 (1989), "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." 489 U.S. at 263 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983))). But the "predicate" to the clear and express statement rule "is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." *Coleman,* 501 U.S. at 735. In petitioner's case, the Delaware Supreme Court unambiguously invoked Rule 8 in the disposition of petitioner's claims: the court's express citation to Rule 8 and its repeated reference to "plain error" (Pet. App. 54a-57a) make that clear. That the state supreme court, as petitioner describes the situation, did not expressly state that Rule 8 procedurally barred his claims is of no import:

> We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular

> language in every case in which a state prisoner presents a federal claim – every state appeal, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739. *See Willis*, 8 F.3d at 555-56 ("After *Coleman*, we believe that the formalism of which we spoke in *Rogers-Bey* [*v. Lane*, 896 F.2d 279 (7th Cir.), *cert. denied*, 498 U.S. 831 (1990)] is no longer the controlling factor.").

c. The judgment of the state supreme court in petitioner's case is independent of federal law. The state supreme court must "be cognizant" of the nature of the federal claim, but deciding whether the alleged error in the context of the particular case before it amounted to "plain error" rests on Delaware law. Pet. App. 7a. That observation by the court of appeals accurately reflects the state plain error doctrine:

- Under the doctrine, there must first be an "error." *See Capano v. State*, 781 A.2d 556, 659-60, 663 (Del. 2001), *cert. denied*, 536 U.S. 958 (2002).
- Next, the error must be "plain" or "obvious" under the law at the time of the appeal. *Johnson v. State*, 813 A.2d 161, 165-66 (Del. 2001); *Capano*, 781 A.2d at 663 & nn.466-67.
- The third requirement is that the absence of any objection by the defense must be due to oversight. *E.g., Smith v. State*, 902 A.2d 1119, 1123 n.2 (Del. 2006); *Keyser v. State*, 893 A.2d 956, 961 (Del.

2006); *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989).

- The fourth requirement is that the error be apparent on the face of the record. *E.g., Diaz v. State*, 508 A.2d 861, 866 (Del. 1986) ("Because the question was not fairly presented to the trial court, the record is incomplete and inadequate as to the reasons for the error. The issue, therefore, may not be raised now for the first time.").

- Finally, the error must have affected the outcome of the trial. *E.g., Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Keyser*, 893 A.2d at 959, 960, 963; *Ortiz v. State*, 869 A.2d 285, 299 (Del.), *cert. denied*, 546 U.S. 832 (2005); *Flowers v. State*, 858 A.2d 328, 332 (Del. 2004); *Johnson*, 813 A.2d at 165; *Capano*, 781 A.2d at 660, 664 & nn.471-72.

Given the elements of the state plain error rule, all of which must be satisfied by the defendant (*e.g., Swan v. State*, 820 A.2d 342, 355 (Del.), *cert. denied*, 540 U.S. 896 (2003)), a holding that the defendant has not established plain error means that he has failed to meet at least one part of the rule. The decision of the court of appeals, against this backdrop of state law, that Rule 8 does not depend on an antecedent ruling of federal law is hardly unreasonable,[5] and review of the question is not warranted.

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[5] *Cf.* Jeffrey L. Lowry, PLAIN ERROR RULE – CLARIFYING PLAIN ERROR ANALYSIS UNDER RULE 52(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, 84 J. Crim. L. & Criminology 1065, 1083-84 (1994) (observing that this Court's decision in *United*

(Continued on following page)

Finally, petitioner's claim that the court of appeals misapprehended the operation of Rule 8 in his own particular case does not have widespread national importance, instead being solely dependent on the particular facts of his case. There is accordingly no national significance to this contention that justifies review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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States v. Olano, 507 U.S. 725 (1993), reinforced "the case-by-case nature of plain error review").

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No. 07-1415

IN THE

Supreme Court of the United States

JAMAR L. CAMPBELL,

Petitioner,

vs.

PERRY PHELPS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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ARGUMENT IN REPLY

The petition demonstrated a clear, intolerable, and irreconcilable conflict among the circuit courts on a question of federal law. Under the holdings of five courts of appeals (spanning 28 states), a state procedural ruling is "dependent" upon federal law when a state court reviews the merits of an otherwise waived federal claim under a "plain-error" exception to a waiver rule. Under the holdings of six other circuit courts of appeals, spanning the remaining 22 states, a state procedural ruling is "independent" of federal law when a state court reviews an otherwise waived federal claim on the merits under a "plain error" exception to a waiver rule.

The petition also demonstrated that the clear conflict among the circuits may be the result of competing principles in this Court's decisions, which, arguably, have been misapplied by some courts of appeals.

Respondent concedes the split and does not even address its consequences. Opposition at 9. Nevertheless, aside from arguing extensively about the merits of the Third Circuit's decision, the Respondent claims that review of the question presented "is not warranted at this time" because the split "is better explained by the varying scope of plain error review among the states (or the particular scope of the plain error analysis by the state court), not by the existence of an irreconcilable split among the courts of appeals." *Id.*

Respondent's argument misses the mark.

1. Although Respondent claims the split is not as "clear" as Petitioner suggests, a comparison of the cases he cites for this proposition underscores the clear conflict among the circuits. In *Willis v. Aiken*, 8 F.3d 556 (7th Cir. 1993), *Daniels v. Lee*,

316 F.3d 477 (4th Cir. 2003) and *Gunter v. Maloney*, 291 F.3d 74 (1st Cir. 2002),[1] the state courts below reviewed waived federal claims for "plain" or "fundamental" error (depending on the phrasing of the state rules). The federal courts of appeals concluded that review on the merits of a waived federal claim was "independent" of federal law and thus a bar to subsequent *habeas* review. By contrast, in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005), *Roy v. Coxon*, 907 F.2d 385 (2d Cir. 1990) and *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), the federal appeals courts all held that reviewing a waived federal claim for "plain" or "fundamental" error was "dependent" upon federal law and thus not a bar to subsequent *habeas* review.

Contrary to Respondent's contention, the split has not resulted from varying applications of state rules by the state courts. As the cases cited by Respondent illustrate, the state courts invoked an exception to a waiver rule and reviewed the merits of federal claims for "plain" or "fundamental" error. That pattern does not vary from decision to decision. *See* Petition at 6-11. What varies is the federal appeals courts' conclusions about whether plain-error review is dependent upon the resolution of a federal question. If a state court reviews a federal claim for plain error, five circuit courts would conclude that the ruling is "dependent" upon federal law; six others (including

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[1] The Tenth Circuit's decision in *Guitierrez v. Moriarty*, 922 F.2d 1464 (10th Cir. 1991), pre-dates *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), which concluded that "[b]ecause the state court denied relief on the merits of the federal claim on plain-error review, procedural bar principles do not apply." Both the Third Circuit and Respondent have erroneously stated that the Tenth Circuit follows the view of the First, Third, Fourth, Sixth, Seventh and Eleventh Circuits that "plain-error" review is independent of federal law. *See* Petition at 10 n.6.

the Third Circuit in this case) hold that the ruling is independent of federal law. Respondent all but concedes that point:

> A state court, conducting plain error review, thus may decide that the particular claim lacks merit under federal law and that there is, perforce, no plain error. The resolution of the state procedural law question in that situation has turned on a federal constitutional ruling, and the state procedural law decision is thus not independent.

Opposition at 8.

Moreover, the split breeds an intolerable inequity, a point Respondent does not bother to address. In this case, Petitioner raised federal claims on appeal to the Delaware Supreme Court that he did not (or could not) raise at trial. On appeal, the Delaware Supreme Court reviewed those claims for "plain error" under Delaware Supreme Court Rule 8. In doing so, the state court reached the merits of the claims. Yet, the district court, and the court of appeals, concluded that a federal *habeas* court could not review those claims because Rule 8's "plain-error" merits review was "independent" of federal law.

If Petitioner had brought his *habeas* petition in a federal district court sitting in New York, Texas, Missouri, Nebraska, Hawaii or Kansas, all of which have state rules similar to Delaware Supreme Court Rule 8,[2] the result would have been different than it was because those district courts sit in circuits that follow a legal rule at odds with the rule the Third Circuit has now adopted.

2. Respondent's remaining contentions either have been addressed in the petition or focus more on the merits of the Third Circuit's decision than

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[2] *See, e.g.*, Petition at 13 n.7.

on the reasons for granting the petition. Because those issues are better addressed in merits briefing after the grant of *certiorari*, Petitioner will only briefly discuss them here.

For example, respondent contends that Delaware Supreme Court Rule 8 is independent of federal law because the state court expressly cited the rule in its opinion. Opposition at 11. But the mere citation of a rule is not enough for the Court to conclude that it is "independent" of federal law, a point addressed on pages 13-14 of the petition.

Respondent also contends that, when the Delaware Supreme Court applies its "plain error" exception, the state court is deciding a question of state law. The federal courts, in turn, are interpreting the state's law, and this Court should not second-guess the federal court of appeals' interpretation. Opposition at 11-12, 14-15. This argument is without merit. First, the Delaware courts have held that "plain error" means federal constitutional errors, as demonstrated on page 16 of the petition. Second, the question in this case is whether a procedural rule with a "plain error" component can preclude *habeas* relief in federal court. Plain error describes the lens through which the state court conducts its examination; the substance of what the state court examines remains, indisputably, federal law. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 375 (2002) (questions of adequacy and independence in *habeas* cases are questions of federal law, not state law).

There is a persistent and intolerable split among the federal courts of appeals with respect to how – and whether – they will review issues presented to state courts under a plain-error standard. That division has current, everyday ramifications, and this Court's review is necessary to bring consistency to this important question of federal law.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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